Supreme Court, U.S.
FILED

031549 MAY 10 2004

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

GM Enterprises, Inc. a Wisconsin Corporation,

Petitioner,

vs.

Town of St. Joseph, Wisconsin,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RANDALL D.B. TIGUE

Randall Tigue Law Office, P.A.
Minnehaha Professional Building
3960 Minnehaha Avenue South
Minneapolis, MN 55406
612/825-0936

Counsel for Petitioner

QUESTIONS PRESENTED

1. In considering the constitutional validity of a regulation of adult entertainment, is it proper to grant summary judgment to the defending municipality, rather than employing the burden-shifting process required under the plurality opinion of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), when an adult entertainment Plaintiff has made a showing indicating that the town "might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses?"

2. If an adult entertainment Plaintiff presents evidence of the absence of adverse secondary effects which is admissible under *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579 (1993), can a defending municipality meet its shifted burden of proof under *Alameda Books*, with anything short of *Daubert* admissible evidence?

PARTIES TO THE PROCEEDING

Petitioner GM Enterprises, Inc., is a Wisconsin corporation.

Respondent Town of St. Joseph, Wisconsin, is an unincorporated town organized under the laws of the State of Wisconsin.

All parties to the proceedings below are parties to this petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, counsel for Petitioner informs this Court that GM Enterprises, Inc., has no parent or subsidiary corporations, and no publicly owned company owns any ownership interest in the corporation.

TABLE OF CONTENTS

Questions to be presented i

Parties to the Proceedings ii

Corporate Disclosure Statements ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 12

I. The refusal of the Seventh Circuit to employ the burden-shifting process mandated by this court's decision in *Alameda Books* contradicts *Alameda Books* and the holding of at least one other federal circuit. 12

A. The Seventh Circuit's decision is directly contrary to the decision of this court in *Alameda Books* .. *12*

B. The refusal to invoke the burden-shifting process is directly contrary to the decision in at least one other federal circuit 19

II. This Court should grant certiorari to consider whether a municipality's shifted burden of proof can be met in the absence of *Daubert* admissible evidence ... 26

Conclusion 29

TABLE OF AUTHORITIES

CONSTITUTIONS:

U.S. Constitution Amend. 1 ..... passim
U.S. Amendment 14 1

STATUTES:

Title 28 U.S.C. Sec. 1254(1) 1
Title 42 U.S.C. Sec. 1983 1

CASES:

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002) ..... passim

Daubert v. Merrell-Dow Pharmaceuticals, 509 U.S. 579 (1993) 26, 27

Flanigan's Enterprises, Inc. v. Fulton County, 242 F. 3d 976 (11th Cir. 2001), cert. denied, 536 U.S. 904 (2002) 7

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla., 337 F. 3d 1251 (11th Cir. July 15, 2003) cert. denied, __U.S.__, 2004 W.L. 77343, 72 U.S.L.W. 3656 (April 19, 2004) 20, 21, 25

SECONDARY AUTHORITIES:

Paul, Linz & Shafer, Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Secondary Effects, 6 Comm. L. & Pol'y 355 (2001) 5, 6

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 350 F. 3d 631 (7th Cir. 2003), and is set forth in the Appendix at App.1-App14.

The unreported order of the Court of Appeals denying the petition for rehearing en banc is set forth in the Appendix at App.25-App.26.

The unreported District Court opinion is set forth in the Appendix at App.15-App.24.

JURISDICTION

The Court of Appeals entered its judgment on November 25, 2003. A timely petition for rehearing and rehearing en banc was denied on February 9, 2004. This Court has jurisdiction pursuant to Title 28 U.S.C. Sec. 1254 (1)

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions, including U.S. Constitution Amendments 1 and 14; Title 42 U.S. Sec. 1983; and the two St. Joseph ordinances which are the subject of this litigation are

set forth in the Appendix at App.27-App.41.

STATEMENT OF THE CASE

At all times pertinent to this lawsuit, Petitioner GM Enterprises, Inc., has operated the Cajun Club, a licensed liquor establishment in the Town of St. Joseph, Wisconsin. For the past 16 years, the Cajun Club has featured lived semi-nude dance entertainment.

On June 21, 2001, Respondent Town of St. Joseph, adopted two ordinances, the text of which are set forth in the Appendix at App. 28-App.41.

Sec. 153-3 of the ordinance, purporting to rely upon various court decisions and studies conducted in cities such as Phoenix, Arizona, Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Baumont, Texas; and St. Croix County, Wisconsin; the Attorney General's Commission on Pornography (1986); and the report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), makes the following "findings:

"1 Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

2. Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.

3. Sexually oriented businesses may contribute to an increase and public health risk through the spread of sexually transmitted diseases.

4. Sexually oriented businesses may encourage and support and facilitate prohibited secondary sexual activities such as prostitution.

5. The consumption of alcoholic beverages on the premises of sexually oriented businesses exacerbates the negative secondary effects of such businesses on the community.

6. There is in increase on the potential for infiltration by organized crime for the purposes of unlawful conduct." Appendix at App. 30-App.31.

Section 153-5 of the ordinance subjects the businesses to the following restrictions:

> "No person, employee, entertainer or patron shall be permitted to have any physical contact with any entertainer on the premises of a sexually oriented business during any performance. To prevent actual physical contact between the entertainer and any person, employee or patron, all performances shall only occur on a stage or table that is elevated at least 18 inches above the immediate floor level and shall be not less than 5 feet from any area occupied by any patron. Patrons shall not have physical contact with and shall not be less than 5 feet from any entertainer during any performance, including, but not limited to, during the payment of a tip or gratuity.
>
> 2. The sale, use or consumption of alcoholic beverages on the premises of a sexually oriented business is prohibited."Appendix at Ap.35-App.36.

The second ordinance No. 2001-03, the text of which is set forth in the Appendix at App. 38-App. 41, contains a similar set of factual findings[1] and contains the following prohibition:

> "It is unlawful for any person to perform or engage in, or for any licensee or manager or agent of the licensee to permit any person,

---

1Id. at App. 38-App.39.

> employee, entertainer or patron to perform or engage in any live act, demonstration, dance or exhibition on the premises of a licensed establishment which:
>
> > (1) Shows his/her genitals, pubic area, vulva, anus, anal clef (sic) or cleavage with less than a fully opaque covering; or
> >
> > (2) Shows the female breasts with less than a fully opaque covering of any part of the nipple and areola;
> >
> > (3) Shows the human male genitals in a discernibly turgid state, even if fully and opaquely covered." Id. at App. 39-App.40.

In challenging the ordinances in questions, Respondent directly attacked the validity of the data purported rely upon by the town in enacting the ordinances in question. They did so in the following manner:

First of all, they tendered to the District Court copies of the article Paul, Linz & Shafer, "Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Secondary Effects,

6 Comm. L. & Pol'y 355 (2001),[2] the article examines the overwhelming majority of the studies purportedly relied upon by the town to establish adverse secondary effects and points out that many of those studies do not support such a conclusion at all, or were done in such a methodologically unsound manner that no reasonable policy maker should rely upon them. In addition, Petitioner tendered an affidavit from Dr. Daniel Linz, one of the authors of the article, pointing out that none of the remaining studies, not covered in the Bryant, Linz and Shafer article were conducted in a methodologically sound manner so as to merit reliance.[3]

Secondly, Petitioner presented a paper attached as an appendix to the amicus curiae brief of the First Amendment Lawyers Association in *City of Los Angeles v. Alameda Books*, supra, 535 U.S. 425 (2002). That paper, in addition to

---

2Since the article is published, it is not included in the appendix in the interest of brevity.

3See Appendix at App. 51-App. 57. The affidavit also points out that the original version of the article authored by Linz, Bryant and Shafer was submitted for peer review at the annual meeting of the International Communication Association, 2000 and received an award for "top three refereed papers in communications law and policy."

reenforcing what was said in the original article, especially as it related to the Los Angeles study which was the subject of the *Alameda Books* litigation, discussed at length secondary effects studies conducted in Fulton County, Ga;[4] Charlotte/Mecklenburg County, North Carolina; and Fort Wayne, Indiana, all of which were done in a methodologically sound manner, and all of which concluded there was absolutely no link whatsoever between adult entertainment and adverse secondary effects. See Appendix at App.85-App.92.[5] Thus, Linz points out that not only are none of the studies relied upon by the city methodologically sound, but that every methodologically sound study, whether performed by

---

4These studies were specifically discussed by the court in *Flanigan's Enterprises, Inc. v. Fulton County,* 242 F. 3d 976 (11th Cir. 2001), cert. denied, 536 U.S. 904 (2002).

5The Linz paper also discusses the 1976 St. Paul, Minnesota studies, frequently relied upon by governmental officials, pointing out that a careful reading of those studies plainly indicates a finding of a complete absence of correlation between sexually oriented adult businesses and adverse secondary effects. See Appendix at App. 101-App.112. Also included is a memorandum of obtained in discovery in Tacoma, Washington, in which a city planner reluctantly admits the total absence of adverse secondary effects. Appendix at App.113.

government agencies, such as the City of St. Paul, or by private individuals, has found a total absence of correlation between adult businesses and adverse secondary effects.

Finally, Petitioner pointed out that the Town of St. Joseph's own experience indicated that, over a period of 16 years, the adult entertainment at Petitioner's establishment has generated no secondary effects. This was done in several respects:

First of all, Petitioner pointed out the only local report relied upon by the Town of St. Joseph, to-wit: the report on adult entertainment prepared by St. Croix County, in which St. Joseph Township is located, in 1993, specifically addresses Petitioner's establishment as follows:

> "In general, unincorporated St. Croix County has not experienced any major problems with adult entertainment establishments. Currently, there are two adult cabaret establishments operating in the unincorporated part of the county that could be affected by the new county policies on adult entertainment. These businesses are located in the towns of St. Joseph and Somerset (emphasis supplied)." Id. at App. 116.

The conclusion of the St. Croix County Planning Department that Petitioner's establishment had not caused "any

major problems" was plainly supported by other evidence presented to the trial court.

See the affidavit of Ann Schmiege, Appendix at App.118-App.133, indicating that over the past 9 or 10 years 4 of the 5 properties adjacent to Petitioner's establishment increased in value at a rate higher than the average rate of increase for the value of residential property in the Township of St. Joseph as a whole. The affidavit also examines statistics of sexually transmitted diseases, indicating that of the 4 counties studied, St. Croix County, with the highest number of adults-only businesses, had the lowest rate of sexually transmitted diseases as a percentage of the population. See Appendix at App.125.

Likewise, the affidavit of Sunnie LaMarre, Appendix at App.134-App.148, compares police calls to three bars in St. Croix County, one featuring adult entertainment and two not. One of the bars displayed significantly higher rate of police calls than did Petitioner's establishment.

Respondent's only significant attempt to refute this evidence, apart from submission of the studies originally relied upon, was an affidavit of St. Croix County Sheriff Dennis Hillstad, indicating that Petitioner's establishment had a

significantly higher rate of police calls than 3 other establishments. However, even that evidence plainly established an absence of any connection between adult entertainment and any adverse secondary effects. To begin with, as pointed out in the affidavit of Fred Meyers, the other establishments to which the Sheriff compared Petitioner's establishments were primarily supper clubs incidently serving liquor, located on rural country roads apart from major thoroughfares, in direct contrast with Petitioner's establishment located on a major thoroughfare, immediately across from the Minnesota border, a fact of particular significance, since bars in Minnesota at the time closed at 1:00 a.m., while bars in Wisconsin closed at 2:30 a.m., making border bars a significant source of traffic as Minnesota drinkers stream across the border for an extra hour and one-half of drinking time. See Appendix at App.150-App.152.

More significantly, the Meyers affidavit points out that the Cajun Club is open for business between the hours of 8:00 p.m., and 2:30 a.m., but that live semi-nude dance entertainment is featured only between the hours of 8:00 p.m. and 12:30 a.m. Between the hours of 12:30 a.m. and 2:30 a.m., Petitioner's establishment, in essence, a singles bar playing

recorded music for public dancing by customers. Id. at App.153-App.154.

The supplemental affidavit of Matthew Biegert, App.157-App.189, points out that when the police calls are broken down by the hours in which they occurred, it appears that police are called far more frequently during the "singles bar" hours than they are during the adult entertainment hours. Indeed, comparing the Biegert and Meyers affidavits, Petitioner's establishment is an adult entertainment facility during 69 percent of its open hours and a singles' bar during 31 percent of those hours. By contrast, the 69 percent of adult entertainment hours generates only 38 percent of the police calls, while the 31 percent of the hours that the establishment is a singles' bar generates 62 percent of the police calls.

Obviously these facts led Sheriff Hillstad publicly to admit that the volume of police calls generated at the Cajun Club had nothing to do with nude dancing. See Meyers' affidavit, App.155.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE SEVENTH CIRCUIT TO EMPLOYEE THE BURDEN-SHIFTING

PROCESS MANDATED BY THIS COURT'S DECISION IN *ALAMEDA BOOKS* CONTRADICTS *ALAMEDA BOOKS* AND THE HOLDING OF AT LEAST ONE OTHER FEDERAL CIRCUIT.

A. THE SEVENTH CIRCUIT'S DECISION IS DIRECTLY CONTRARY TO THE DECISION OF THIS COURT IN *ALAMEDA BOOKS.*

In *City of Los Angeles v. Alameda Books,* 535 U.S. 425, supra, (2002), the United States Supreme Court discussed the evidentiary showing required in order to sustain a municipal regulation of adult entertainment, under the First Amendment, pursuant to a secondary effects theory. Of key importance is the following language in the plurality opinion of Justice O'Connor:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this

> rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] Id. at 438-439.

As pointed out in the statement of facts above, Petitioner in the instant case made precisely the showing suggested by Justice O'Connor to "cast doubt" upon the validity of the municipality's findings. Notwithstanding such a showing the Seventh Circuit upheld a grant of summary judgment to the defending municipality stating:

> "Plaintiff argues that it has 'substantially challenged the validity of the town's determination that its regulation was justified by the need to combat adverse secondary effects of adult entertainment,' and has therefore precluded summary judgment by shifting the burden back to the Town to supplement the record. We disagree. Plaintiff submitted some evidence that might arguably undermine the Town's inference of the correlation of adult entertainment and adverse secondary effects,

including a study that questions the methodology employed in the numerous studies relied upon by the Board; evidence of an increase in property values near the club; and evidence that the majority of police calls in regards to the club originated during periods of time when no semi -nude dancing occurred. Although this evidence shows that the Board might have reached an equally and reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process.

Alameda Books does not require court to re-weigh the evidence considered by a legislative body. Nor does it empower a court to substitute its judgment in regards whether a regulation with best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed. [Citation omitted.] (Kennedy J. concurring in the judgment) ('In my view, the plurality's application of *Renton* might constitute a subtle expansion with which I do not concur)' wrote Justice Kennedy, 'as a general matter, courts should not be in the business of second-guessing, fact-bound empirical assessments of city planners... the Los Angeles City Council knows the streets of Los Angeles better than we do.' [Citation omitted.]

> The plurality expressed similar support for judicial deference to local lawmakers.' We must acknowledge that the Los Angeles City Council is in a better position than the judiciary to gather and evaluate data on local problems.' [Citation omitted.] " Appendix at App.12-App.13.

Only two possible explanations exist for the Seventh Circuit's refusal to invoke Justice O'Connor's burden-shifting process, both of which are clearly contrary to the reasoning of this Court in *Alameda Books.*

The first is that the evidentiary showing made by Petitioner was insufficient to cast doubt upon the validity of the municipality's conclusions. However, the Seventh Circuit conceded that Petitioner's evidence, which included not only a peer-reviewed analysis showing that all of the studies relied upon by the municipality were unreliable and methodologically unsound; empirically sound studies from other jurisdictions reaching exactly the opposite conclusion; as well as property

value and crime statistics showing no correlation between Petitioner's establishment and adverse secondary effects, showed "that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses." Id. There are two obvious flaws with this analysis:

First of all, given the evidence Petitioner presented, it can hardly be said that the conclusion that adult entertainment causes adverse secondary effects is "equally reasonable" as the conclusion that it does not. Respondent presented no evidence that the studies the city purported relied were methodologically sound or otherwise reliable; no evidence that the empirically sound studies indicating absence of secondary effects were in any way unreliable; and, other than Sheriff Hillstad's statistics, which actually show an absence of secondary effects

attributable to adult entertainment, presented absolutely no evidence to contradict the fact that Petitioner's establishment has caused no adverse secondary effects in 16 years of existence. Clearly the conclusion that the town's evidence rendered its conclusions "equally reasonable" is absolutely unjustified.

Secondly, and even more significantly, if evidence that the Board might have reached "a different and equally reasonable conclusion" does not "cast direct doubt" upon the validity of the Board's conclusion, what does?

To assert, as did the Seventh Circuit, that because it cannot substitute its judgment for that of the Board, Petitioner's showing is inadequate is to permit the municipality to get away with the very "shoddy data and reasoning" condemned by Justice O'Connor in *Alameda Books*.

The second alternative explanation for the Seventh

Circuit's decision is the suggestion that since Justice O'Connor's plurality opinion amounted to that of only four Justices, the Seventh Circuit should follow Justice Kennedy's concurrence, in which he suggested that he would not second guess the empirical judgments of the Los Angeles City Council. If anything, this alternative is far more inconsistent with both *Alameda Books*. It is inconsistent with *Alameda Books*, in that Justice O'Connor's plurality opinion with respect to the shifting burden of proof is absolutely the minimum evidentiary burden demanded by at least 8 justices of this Court. In his dissenting opinion, Justice Souter, supported by three other Justices demanded an empirical showing of the relationship between adult entertainment and adverse secondary effects, not after doubt has been cast by the Plaintiff, but in the first instance. See 534 U.S. at 458-460, Souter, J. dissenting. Consequently, it is clear that the burden-shifting process

demanded in the O'Connor plurality has at least the implicit support of 8 members of this Court, 4 of whom would require a far stronger empirical showing in the first instance than would Justice O'Connor. To the extent that the panel opinion rejects the requirements of the O'Connor plurality, it is consistent with *Alameda Books.*

B. THE REFUSAL TO INVOKE THE BURDEN-SHIFTING PROCESS IS DIRECTLY CONTRARY TO THE DECISION IN AT LEAST ONE OTHER FEDERAL CIRCUIT.

In its opinion, the Seventh Circuit discussed the fact that the courts should not substitute their judgment for that of municipalities. This is a misstatement of the issue. The question is not one of substituting the court's judgment for elected officials, but rather one of a shifting burden of proof. Under the O'Connor plurality in *Alameda Books*, if an adult entertainment Plaintiff casts direct doubt as to the validity of its data, either by attacking the validity of the data, or by presenting contrary evidence, the burden shifts to the municipality to come forward with evidence to justify its

regulation.

The issue in this case was not whether the court's judgment should be substituted for that of the elected officials, but rather whether the municipality had satisfied its shifted burden of proof. In refusing to recognize this distinction, the panel reached a decision directly contrary to that of the Eleventh Circuit in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F. 3d 1251 (11th Cir. July 15, 2003) cert. denied, __U.S.__, 2004 W.L. 77843, 72 U.S. U.S.L.W. 3656 (April 19, 2004), in which the court reversed a grant of summary judgment to the County of Manatee, in a constitutional challenge to both the county's adult entertainment zoning/regulation ordinance, and its public nudity ordinance. Although the court held that reliance upon many of the same studies relied upon by the town in the instant case satisfied the minimal pre-enactment burden in *Renton*, it held summary judgment was inappropriate, based upon the Plaintiffs' submission of substantial contradictory evidence as to adverse secondary effects. The court stated:

> "Taken together, the Adult Lounges argue that this evidence 'casts direct doubt' on the County's alleged rationale in enacting ordinance 99-18 'by demonstrating that [the

> county's] evidence does not support its rationale' and 'by furnishing evidence that disputes the [county]'s factual findings.' [Citation omitted.] Given the record and procedural posture of this case, we are inclined to agree. Although Manatee County met its minimal initial burden under *Renton* to rely on evidence it reasonably believed to be relevant to addressing the problem of secondary effects, in this case Appellants have successfully cast doubt on the county's rationale by placing into the record substantial and unanswered factual challenges to the County's findings in the specific areas of crime, decreased property values, aesthetic blight and other secondary effects." Id. at 1371-1272.

Of particular significance is the fact that the court noted that *Alameda Books* involved the reversal of a grant of summary judgment to the adult entertainment business, while *Peek-A-Boo Lounge* involved the grant of summary judgment to the county. Upon reviewing the standards for the issuance of a grant of summary judgment, the Eleventh Circuit stated:

> "In this case, the District Court failed to draw all justifiable inferences in favor of the Adult

> Lounges as to the credibility and weight of their evidence, which when properly interpreted does appear to create a genuine issue of material fact under prevailing legal standards as to whether Ordinance 99-18 furthers the County's asserted interest.
>
> Significantly, the County has not attempted to counter the Adult Lounges' evidence with local studies of its own. We are not dealing, therefore, with a case involving a battle of competing experts. Rather, as the record now stands, we have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting Plaintiffs' businesses, which have operated continuously in Manatee County for over 15 years do not cause secondary effects. Under these circumstances, we cannot credit the county with complying with *Renton's* narrow tailoring requirement, which requires that a secondary effects ordinance be drawn to affect only that category of business 'shown to produce the unwanted secondary effects.' [Citation omitted, emphasis by the Eleventh Circuit.]" Id. at 1272.

Finally, it should be noted that the Eleventh Circuit clearly distinguished between the court substituting its

judgment for the county's legislative body on the one hand, and a shifting burden of proof on the other hand.

The Eleventh Circuit stated:

> "We note that the fact that the Adult Lounges have managed, in their 'as applied' challenge, to cast doubt on the county's basis for enacting Ordinance 99-18 does not mean that ordinance could not ultimately survive intermediate scrutiny. Rather, under *Alameda Books*, at this point summary judgment is inappropriate and 'the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.' [Citations omitted.] Thus, the County must be given the opportunity to supplement the record in this manner, and the District Court, which did not have the benefit of *Alameda Books* when it granted the County's motion for summary judgment, should consider any additional evidence in the first instance.
>
> At trial, in keeping with *Alameda Books'* burden-shifting analysis, the District Court, must determine whether the County's additional evidence 'renew[s] support for a theory that justifies its ordinance.' [Citation omitted.] Stated otherwise, in light of our finding that the Adult Lounges have managed to cast direct doubt on the county's rationale for adopting

> Ordinance 99-18, the District Court must decide by a preponderance of the available evidence (including whatever additional evidence the county places in the record) whether there remains credible evidence upon which the county could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments in Manatee County. The burden lies with the county in this regard. However, the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the county reasonably relies." Id. at 1272-1273.

Clearly, the Eleventh Circuit's analysis is plainly more consistent with the holding in *Alameda Books*. With doubt having been cast on the validity of the municipality's original conclusions, summary judgment is inappropriate, not because the court is substituting its judgment for that of the municipality, but rather because the municipality has not come forward with any evidence to sustain its shifted burden of

proof.[6]

To be sure, this Court has recently denied certiorari in *Peek-A-Boo Lounge*. See 2004 W.L. 77843, 72 U.S.L.W. 3656 (April 19, 2004). However, although *Peek-A-Boo Lounge* presented the same issues as the instant case, only from the opposite side, there are at least two reasons why certiorari should be granted in the instant case, even though it was denied in *Peek-A-Boo Lounge*, which presented the same conflict between the circuits:

First of all, *Peek-A-Boo Lounge* involved the review of the reversal of a grant of summary judgment. As *Peek-A-Boo*

6Such evidence might, for example, consist of evidence that, contrary to Petitioner's submissions, the studies relied upon by the municipality had scientific validity; evidence indicating that the scientific studies relied upon by Petitioner were unreliable; or affirmative evidence, otherwise admissible in court, supporting the connection between adult entertainment and secondary effects. Having done none of these, it is clear that the town failed to meet its shifted burden of proof.

Lounge stood, it was to be remanded for trial on the very issues which *Alameda Books* said should be tried. It was thus a review of what amounts to an interlocutory order, rather than a final judgment.

Secondly, and more importantly, *Peek-A-Boo Lounge* reached a decision absolutely consistent with this Court's decision in *Alameda Books;* the Seventh Circuit in the instant case did not. Thus, the instant case presents not only a final judgment for review, but a judgment clearly inconsistent with *Alameda Books.*

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A MUNICIPALITY'S SHIFTED BURDEN OF PROOF CAN BE MET IN THE ABSENCE OF *DAUBERT* ADMISSIBLE EVIDENCE.

In holding, as it did[7] that the evidence relied upon by a municipality to support the initial enactment of an adult entertainment regulation need not meet the standards of

---

7Appendix at App.13.

admissibility set forth in *Daubert v. Merrell-Dow Pharmaceuticals,* 509 U.S. 579 (1993), the Seventh Circuit knocked down a straw man. It obviously failed to make the distinction clearly made by Justice O'Connor in her *Alameda Books* plurality opinion. Justice O'Connor plainly distinguished between the showing required for initial enactment, unchallenged by an adult entertainment Plaintiff, on the one hand, and the burden required when such a Plaintiff makes an evidentiary challenge to the initial enactment, either by questioning the validity of the city's data or by submitting contrary evidence of its own. Under these latter circumstances, Justice O'Connor plainly holds that the burden "shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance (emphasis supplied)." 535 U.S. at 439.

Clearly, the term "evidence" means admissible evidence which a court can receive. If the evidence is of a scientific nature, supporting the proposition that adult entertainment establishments cause adverse secondary effects, then certainly it must meet the minimum standards for admissibility of such evidence under *Daubert v. Merrell Dow Pharmaceuticals,* supra, 509 U.S. 579 (1993). Plainly, if the studies relied upon

by the Town of St. Joseph lacked minimum methodological rigor, they are inadmissible under *Daubert*, and are thus plainly inadequate to meet the municipality's shifted evidentiary burden under *Alameda Books*. Indeed, anything else would render essentially meaningless Justice O'Connor's assertion that municipality's cannot rely on "shoddy data or reasoning." Id. at 438.

Thus, while cities retain the absolute right to rely upon virtually anything for initial enactment, once the validity of the city's data is genuinely challenged in court, only admissible evidence will suffice to meet the municipality's shifted burden of proof.[8] Because this is an obviously important issue, and one of first impression in the United States, certiorari

---

8This is especially true where, as here, Petitioner not only attacked the validity of the studies relied upon by the town, but presented uncontradicted peer-reviewed, clearly *Daubert*-admissible evidence from jurisdictions all over the United States indicating an absence of correlation between adult entertainment and adverse secondary effects. Plainly, if direct doubt is cast by use of *Daubert*-admissible evidence, it is difficult to see how the city's shifted burden could ever be overcome by more "shoddy data and reasoning" which fails to meet the minimal *Daubert* standards of reliability.

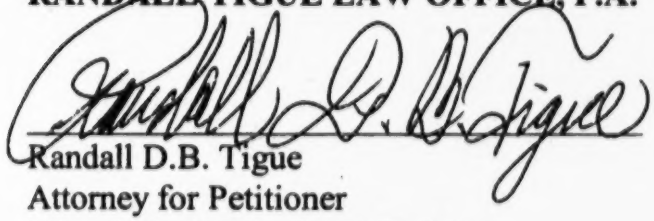
consideration should be granted to consider it.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be, in all respects, granted.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



Randall D.B. Tigue
Attorney for Petitioner
Minnehaha Professional Building
3960 Minnehaha Avenue South
Suite 100
Minneapolis, MN 55406
612/825-0936

Dated: May 6, 2004

APPENDIX INDEX

Seventh Circuit opinion App.1

District Court opinion App.15

Seventh Circuit order denying rehearing App.25

Constitutional and statutory provisions App.27

Town Board minutes containing ordinance text App.28

Affidavit of Daniel Linz App.42

Linz and Paul paper App.59

Excerpt from St. Croix County
Planning Department report App.114

Affidavit of Ann Schmiege App.118

Affidavit of Sunnie D. LaMarre App.134

Affidavit of Fred Meyers App.149

Affidavit of Matthew Biegert App.157

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-1428

G.M. ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

TOWN OF ST. JOSEPH, WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 02-C-0396-S—**John C. Shabaz**, *Judge.*

ARGUED SEPTEMBER 16, 2003—DECIDED NOVEMBER 25, 2003

Before FLAUM, *Chief Judge*, and DIANE P. WOOD and WILLIAMS, *Circuit Judges.*

FLAUM, *Chief Judge*. G.M. Enterprises, Inc., owner of the Cajun Club of the Town of St. Joseph, Wisconsin, appeals the District Court's grant of summary judgment to the Town upholding the constitutionality of two town ordinances. G.M. argues that Ordinance 2001-02, which regulates the manner in which nude dancers perform in any "sexually oriented business," and Ordinance 2001-03, which prohibits establishments licensed to sell alcoholic beverages from permitting nude dancing on the premises, violate the First and Fourteenth Amendments. We conclude that the record supports the Town's claim that the ordinances are

App. 1

not an attempt to regulate the expressive content of nude dancing, but that the Town had a reasonable basis for believing that the ordinances will reduce the undesirable "secondary effects" associated with sexually oriented businesses, and therefore, we affirm.

I. Background

In 1999, the Town Board ("Board") of the Town of St. Joseph ("Town"), an unincorporated town in Wisconsin, began to consider whether to regulate sexually oriented businesses located within its borders. The Board collected sixteen studies regarding the relationships between sexually oriented businesses and property values, crime statistics, public health risks, illegal sexual activities such as prostitution, and organized crime. These studies, undertaken in various communities throughout the country, demonstrated a correlation between sexually oriented businesses and negative secondary effects. The Board also consulted a number of judicial opinions from other jurisdictions that address adverse secondary effects associated with sexually oriented businesses. Further, the Board considered police reports of calls made in regards to each licensed liquor establishment in St. Joseph for the period of 1989 through 1999, furnished by the St. Croix County Sheriff's Department. The sheriff informed the Board that the sheriff department had "received far more calls regarding the Cajun Club [the Town's sole sexually oriented business licensed to sell alcoholic beverages] than we have for the other liquor establishment in the Town of St. Joseph that do[es] not offer sexually oriented entertainment such as nude dancing." The studies, judicial opinions, and police reports were available to members of the Board for their consideration.

In June 2001, the Board adopted Ordinance 2001-02, which was codified under the town code, Chapter 153, en-

App. 2

titled "Sexually Oriented Businesses." "Sexually oriented businesses," as defined by § 153-4, include "business[es] featuring adult entertainment." "Adult entertainment," as defined by § 153-4, is any "live performance, display or dance of any type which has as a significant or substantial portion . . . characterized by an emphasis on . . . viewing of specified anatomical areas." § 153-4. According to § 153-4, "[s]pecified anatomical areas" include:

> A. The human male genitals in a discernible turgid state, even if fully and opaquely covered; or
>
> B. Less than completely and opaquely covered human genitals, pubic region, anus, anal cleft or cleavage; or
>
> C. Less than completely and opaquely covered nipples or areolas of the human female breast.

Ordinance 2001-02, published in Section 153-3(A), prohibits sexually oriented businesses from allowing any:

> person, employee, entertainer or patron . . . to have any physical contact with any entertainer on the premises of a sexually oriented business during any performance . . . all performances shall occur on a stage or table that is elevated at least 18 inches above the immediate floor level and shall not be less than 5 feet from any area occupied by any patron.

Further, § 153-5(B) prohibits the "sale, use or consumption of alcoholic beverages on the premises of a sexually oriented business."

The Board stated in § 153-1 that its motivation for passing this ordinance was that it:

> finds that sexually oriented businesses are frequently used for unlawful sexual activities . . . and . . . concern over sexually transmitted diseases is a legitimate health concern of the Town Board . . . there is convinc-

> ing documented evidence that sexually oriented businesses have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and, whereas, the Town Board desires to minimize and control these adverse secondary effects. . . and, whereas it is not the intent of this chapter to suppress any speech activities protected by the First Amendment, but to . . . address[ ] the negative secondary effects of sexually oriented businesses.

Concurrent with the adoption of Ordinance No. 2001-02, the Board adopted Ordinance No. 2001-03, codified under Chapter 114, Article VI of the town code, entitled "Nude Dancing in Licensed Establishments Prohibited." Ordinance No. 2001-03 applies to "[a]ny establishment licensed by the Town Board . . . to sell alcohol beverages." § 114-19. Under Ordinance No. 2001-03,

> [i]t is unlawful for any person to perform or engage in . . . any live act, demonstration, dance or exhibition on the premises of a licensed establishment which:
>
> A. Shows his/her genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering.
>
> B. Shows the female breast with less than a fully opaque covering of any part of the nipple and areola.
>
> C. Shows the human male genitals in a discernibly turgid state, even if fully and opaquely covered.

§ 114-17. The Board expressed its intent in regards to Ordinance 2001-03 by stating in Section 114-16 that:

> the Town Board is aware, based on the experiences of other communities, that bars and taverns, in which live,

> totally nude, non-obscene, erotic dancing occurs may and do generate secondary effects which the Town Board believes are detrimental to the public health, safety and welfare . . . the Town Board desires to minimize, prevent and control these adverse effects . . . the Town Board has determined that the enactment of an ordinance prohibiting live, totally nude, non-obscene, erotic dancing in bars and taverns licensed to serve alcoholic beverages promotes the goal of minimizing, preventing and controlling the negative secondary effects associated with such activity.

The plaintiff in this action, G.M. Enterprises, operates the Cajun Club ("Club") of St. Joseph. The Club enjoys a St. Joseph liquor license and, for 16 years, has served alcohol and offered semi-nude, topless dance entertainment. It is uncontested that G.M. is a "sexually oriented business" subject to Ordinances Nos. 2001-02 and 2001-03, as its dancers expose "specified anatomical areas." G.M. filed a complaint in the United States District Court, Western District of Wisconsin, pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief and alleging that the ordinances are unconstitutional. The complaint alleged that the Board did not rely on adequate evidence to demonstrate the necessity of the ordinances to combat adverse secondary effects; that the ordinances prohibit more expression than is necessary to combat any adverse secondary effects that might be caused by adult entertainment; and further that Ordinance No. 2001-03 expressly conditions the grant of a liquor license, a government benefit, on the surrender of the constitutional right to freedom of expression.

The Town moved for summary judgment, arguing that the Board relied on an adequate evidentiary foundation to reasonably believe that the ordinances would reduce adverse secondary effects. In support of its motion, the Town submitted an affidavit by the city clerk attesting to the

Board's access to the studies, cases, and police reports relied upon in its deliberations, and further that every member of the Board "spent time reviewing the materials." The Town also submitted an affidavit by the county sheriff attesting to the fact that more police calls were made in regards to the Club than any other liquor establishment in the Town.

In its opposition to the Town's motion, G.M. questioned the Board's conclusion that the ordinances would have the effect of minimizing adverse secondary effects. G.M. argued that the Board did not actually review or rely on the studies and cases that it gathered. G.M. presented a study by Bryant Paul, Daniel Linz & Bradley Shafer that finds the majority of the studies the Board collected "fundamentally unsound," and methodologically flawed, and also submitted an affidavit of Daniel Linz that discusses the study. G.M. further argued that the Board's findings are contrary to the locality's actual experience, and, in support, referred to a 1993 study of the county where the Club is located that states that "St. Croix county has not experienced any major problems with adult entertainment establishments." In addition, G.M. submitted an affidavit stating that the property values near the Club have increased over time. G.M. contested the Town's inference that the Club's entertainment generates secondary effects by submitting an affidavit of the president of G.M. Enterprises which stated that the majority of calls to the police regarding incidents at the Club were generated during the hours when no nude or semi-nude dancing entertainment was offered. G.M. also submitted a statement by the sheriff that the volume of police calls generated by the Club were unrelated to nude dancing.

The district court entered judgment in favor of the Town, finding that the ordinances do not impermissibly infringe on G.M.'s constitutional rights, and further that G.M.'s challenge to the Town's secondary effects rationale did not

raise an issue of material fact to allow the case to proceed to trial. G.M. now appeals.

II. Discussion

We review the District Court's grant of summary judgment *de novo*, construing the facts in the record in favor of G.M., the non-moving party. *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 707 (7th Cir. 2003).

Nude dancing is expressive conduct "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). The ordinances at issue regulate nude dancing in two ways. If a dancer exposes any "specified anatomical area," then the establishment where he or she performs must (1) not sell any alcoholic beverages, § 153-3(B), § 114-17, and (2) require that he or she perform on a stage at least eighteen inches above and five feet away from patrons, as required by § 153-3(A). However, neither requirement is implicated if dancers cover all "specified anatomical areas" during performances, and neither ordinance prohibits nude dancing outright.

Still, plaintiff argues that Ordinances Nos. 2001-02 and 2001-03 regulate constitutionally protected activity. We disagree. The requirement that dancers wear pasties and G-strings has only a "*de minimis*" effect on the expression conveyed by nude dancing. *Pap's A.M.*, 529 U.S. at 294; *Ben's Bar*, 316 F.3d at 708. Further, the "First Amendment does not entitle . . . dancers, or . . . patrons, to have alcohol available during a 'presentation' of nude or semi-nude dancing." *Ben's Bar*, 316 F.3d at 726. And, while the constitutionality of a restriction prohibiting physical contact between nude dancers and their patrons is an issue of first impression in this circuit, the Fifth Circuit has twice had the occasion to consider similar restrictions and has found

App. 7

them to be constitutional on the grounds that physical contact is beyond the scope of the protected expressive activity of nude dancing. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 484 (5th Cir. 2002). Yet, as these regulations do have an incidental effect on protected expression, they must meet constitutional standards to be upheld.

The parties submit that, in order to determine the correct constitutional analysis to apply to the ordinances at issue, this Court must first decide whether the ordinances intend to regulate the expressive element of nude dancing, or whether they are neutral as to content. In the Town's view, the ordinances seek to regulate only the adverse secondary effects associated with nude dancing, and are thus content neutral. In support, the Town cites *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986). In *Renton*, the Supreme Court held that an adult entertainment zoning ordinance was a "'content-neutral' regulation of speech because while 'the ordinance treats theaters that specialize in adult films differently from other kinds of theaters . . . .[it] is aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community.'" *Ben's Bar*, 316 F.3d at 716 (quoting *Renton*, 475 U.S. at 47) (emphasis in original). In contrast, the plaintiff argues that the secondary effects rationale of *Renton* is no longer good law, and further that the ordinances are content based and therefore subject to strict scrutiny.

In light of the Supreme Court's divided ruling in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), we need not decide whether the ordinances are content based or content neutral, so long as we first conclude that they target not "the activity, but . . . its side effects," *see Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring in

the judgment), and then apply intermediate scrutiny. In *Alameda Books*, the plurality upheld at summary judgment a Los Angeles ordinance that prohibited multiple adult entertainment businesses from operating in the same building. The plurality assumed the ordinance to be content neutral, but did not consider the issue directly due to the fact that the Ninth Circuit had not addressed it below. *Alameda Books*, 535 U.S. at 434, 441. However, the plurality reaffirmed that the first step of the *Renton* analysis is to verify that the "predominate concerns motivating the ordinance were with the secondary effects of adult speech, and not with the content of the adult speech." *Alameda Books*, 535 U.S. at 440-41 (internal quotations omitted). In his concurring opinion, Justice Kennedy agreed that the *Renton* test provided the appropriate level of scrutiny for a regulation that is "targeted not at the activity, but at its side effects." *Alameda Books*, 535 U.S. at 447. And, employing an approach similar to the plurality's, Justice Kennedy insisted that a municipality first "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," before a court applies intermediate scrutiny. *Id.* at 449. Although, unlike the plurality, Justice Kennedy wrote that zoning ordinances of adult businesses are "content based," *see id.*, he agreed with the plurality that "[n]evertheless, . . . the central holding of *Renton* is sound: A zoning ordinance that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 448. As Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court, it is the controlling authority under *Marks v. United States*, 430 U.S. 188, 193 (1976). *Ben's Bar*, 316 F.3d at 722.

Under the first step of the analysis set forth by both Justice Kennedy and the plurality, we must first determine

App-8

whether the ordinances at issue are motivated by an interest in reducing the secondary effects associated with the speech, rather than an interest in reducing the speech itself, before turning to *Renton*. *See Alameda Books*, 535 U.S. at 440-41, 450. To survive this step of the analysis, "the rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech." *Id.* at 450. The Town has met this burden. Neither of the ordinances prohibit nude dancing; rather, they merely seek to minimize the factors that the Board believed would heighten the probability that adverse secondary effects would result from nude dancing: physical proximity between the dancers and patrons, and the consumption of alcohol by patrons. Requiring that adult entertainment establishments maintain a minimal physical buffer between patrons and dancers does not reduce the availability of nude dance entertainment. And, "alcohol prohibition is, as a practical matter, the least restrictive means of furthering the . . . interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption." *Ben's Bar*, 316 F.3d at 725. Further, if all dancers choose to wear the *de minimus* clothing necessary to cover all "specified anatomical parts," then neither the physical proximity nor alcohol prohibition requirements are implicated. Thus, as the ordinances will leave the availability of nude dance entertainment substantially the same, under Justice Kennedy's test of "how speech will fare under the city's ordinance[s]," *Alameda Books*, 535 U.S. at 450, the Town has demonstrated that its goal is to minimize secondary effects, rather than the speech itself.

Therefore, we move to the second step of the *Renton* analysis. In *Renton*, the Court set forth the intermediate scrutiny test for zoning regulations of adult businesses aimed at suppressing secondary effects. Such regulations are constitutional "so long as they are designed to serve a

substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47, *reaffirmed in Alameda Books*, 535 U.S. at 434. Regulations of public nudity, however, are analyzed under the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Pap's A.M.*, 529 U.S. at 289. The *O'Brien* test asks (1) whether the regulating body had the power to enact the regulation; (2) whether the regulation furthers an important or substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the regulation's incidental impact on expressive conduct is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

Ordinances Nos. 2001-02 and 2001-03 are neither public indecency nor zoning regulations. They regulate the manner in which patrons view nude dancing; specifically, the patron's physical proximity to the nude dancer and the patron's access to alcoholic beverages in establishments where nude dancing is provided. Because this case concerns only the "substantial government interest" prong that is found in both the *O'Brien* and *Renton* tests, we need not decide which test of intermediate scrutiny provides the correct analytical framework for these ordinances. Indeed, this Court has held that the constitutional standard for "evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable." *Ben's Bar*, 316 F.3d at 714.

The issue before this Court is what quality and quantum of evidence a regulating body must consider in order to demonstrate that it has a reasonable basis for believing that the regulated activity generates adverse secondary effects, the reduction of which is a "substantial government interest" under the *Renton* or *O'Brien* tests. This issue was most recently before the Supreme Court in *Alameda Books;* in the plurality's words, the case required the court to

"clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*." *Alameda Books*, 535 U.S. at 433. In *Alameda Books*, the plurality reaffirmed that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books* at 438, (quoting *Renton*, 475 U.S. at 51-52). The plurality upheld an ordinance that prohibited the operation of multiple adult entertainment business in the same building, even though the regulating body did not rely upon a study that specifically addressed whether the concentration of such establishments in a single building would result in a higher incidence of adverse secondary effects. *Id.* at 437. According to the plurality, it was reasonable for the regulating body to infer—from a somewhat dated study that concluded that the concentrated growth of adult entertainment establishments in a particular neighborhood led to increased crime there—that the concentration of adult establishments in a single building would lead to a similar increase in crime. *Id.* at 435-38. The plurality did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects.

However, the plurality cautioned that:

> a municipality's evidence must fairly support the municipality's rationale . . . . If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to

App. 11

> supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39. Plaintiff argues that it has "substantially challenged the validity of the town's determination that its regulation was justified by the need to combat adverse secondary effects of adult entertainment," and has therefore precluded summary judgment by shifting the burden back to the Town to supplement the record. We disagree. Plaintiff submitted some evidence that might arguably undermine the Town's inference of the correlation of adult entertainment and adverse secondary effects, including a study that questions the methodology employed in the numerous studies relied upon by the Board; evidence of an increase of property values near the Club; and evidence that the majority of police calls in regards to the Club originated during periods of time when no semi-nude dancing occurred. Although this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process.

Alameda Books does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed. *See Renton*, 475 U.S. at 51-52, *see also Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) ("in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur."). Wrote Justice Kennedy, "as a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city

planners . . . the Los Angeles City Council knows the streets of Los Angeles better than we do." *Alameda Books*, 535 U.S. at 451. The plurality expressed similar support for judicial deference to local lawmakers: "we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems." *Id.* at 440.

Plaintiff argues that its complaint must survive summary judgment because the evidence relied upon by the Board does not meet the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Under the plaintiff's view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary effects, as required by *Alameda Books* and *Renton*, unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert*. This argument is completely unfounded. The plurality in *Alameda Books* bluntly rejected Justice Souter's suggestion that the municipality be required to present empirical data in support of its contention: "such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books*, 535 U.S. at 439. Further, the purpose of the evidentiary requirement of *Alameda Books* is to require municipalities to demonstrate reliance on some evidence in reaching a reasonable conclusion about the secondary effects. The municipality need not "prove the efficacy of its rationale for reducing secondary effects prior to implementation." *Ben's Bar*, 316 F.3d at 720. A requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

III. Conclusion

For the reasons discussed, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

GM ENTERPRISES, INC.,

Plaintiff,

MEMORANDUM AND ORDER

v.

02-C-396-S

TOWN OF ST. JOSEPH, WISCONSIN,

Defendant.

Plaintiff G.M. Enterprises commenced this action against Defendant Town of St. Joseph, Wisconsin, alleging Defendant violated its first amendment rights pursuant to 42 U.S.C. § 1983. Plaintiff seeks injunctive relief and a declaration that the ordinances enacted by Defendant are unconstitutional and invalid. Before the Court is Defendant's motion for summary judgment. Jurisdiction is pursuant to 28 U.S.C. § 1331.

FACTS

Plaintiff owns the "Cajun Club" which is located within the limits of Defendant and for the past sixteen years has offered semi—nude (topless) dance entertainment and holds a liquor

license issued by Defendant.

In 1999 Defendant began to investigate the feasability of enacting ordinances regulating businesses similar to that of Plaintiff. To this end Defendant obtained a variety of studies from other jurisdictions that had enacted similar ordinances and police reports from local law enforcement involving other bars within its limits. These materials were made available to the Defendant's town board members for their consideration.

On or about June 21, 2001 Defendant enacted two ordinances. The first, codified under Section 153 of the town code, addressed regulation of "sexually oriented businesses." The parties agree that Plaintiff's establishment falls within the definition of a sexually oriented business. The second, codified under section 114 of the town code, decreed both full and partial nude dancing illegal on the premises of any holder of a liquor license.

Both ordinances include statements noting Defendant's concern that a business similar to Plaintiff's results in adverse

secondary effects such as increase in crime, property value depreciation, the spread of sexually transmitted diseases and Defendant's desire to mitigate these deleterious effects. These statements also demonstrate Defendant's desire not to infringe upon any First Amendment rights associated with adult entertainment similar to that offered by Plaintiff. The ordinance regulating sexually oriented businesses also contains a statement of findings citing to the aforementioned studies as well as a number of court cases upholding regulations governing adult and sexually—oriented businesses as justification for the ordinance.

The relevant purpose of these two ordinances is to prevent Plaintiff from offering any nude dancing, to include topless as well as full nudity, in conjunction with the sales and consumption of liquor. Where liquor is sold or consumed, or the establishment holds a liquor license regardless of whether alcohol is sold, any erotic dancers on the premises must wear at least a G-string and pasties. Where an establishment offers nude dancing the patrons are prohibited from having contact with the dancers. To aid in this requirement any such dancer must perform on a platform raised at least eighteen inches from the floor and remain at least five feet

from the patrons.

Plaintiff challenges these ordinances as violative of its First Amendment rights and seeks a permanent injunction against their enforcement as well as a declaration of unconstitutionality. Defendant has moved for summary judgment, asserting that the ordinances are constitutional.

MEMORANDUM

Summary judgment pursuant to Rule 56 may be entered when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any! show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." All inferences to be taken from the evidence are viewed in a light most favorable to

the. non—movant. The non-movant must, however, present specific facts demonstrating the existence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). •A movant may prevail on summary

judgment if after taking all inferences in favor of the non-movant no reasonable fact-finder could find for the non-movant. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986)

Although nudity itself is not protected expression, nude dancing falls "within the outer ambit of the First Amendment's protection." City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) Regulations that affect protected speech are constitutional if they are within the government's constitutional powers, further a substantial governmental interest that is unrelated to the suppression of protected expression, and the regulation is no broader than necessary to further the substantial interest. United States v. O'Brien, 391 U.S. 367, 377 (1968) Such regulations are considered content-neutral as they address the time, place, or manner of expression, and if reasonable may be imposed provided "the restrictions 'are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication'" of the expression. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)

(citing Clark v.Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Renton v. Playtime Theatres. Inc., 475 U.S. 41, 47 (1986) (also citing to Clark) Furthermore, a narrowly tailored restriction ~need not be the least restrictive. "[R]egulation of the time, place, or manner of protected speech need not be the least restrictive or least intrusive means of" furthering legitimate governmental interests. Id. at 798; see also Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988, 1002 (7th Cir. 2002.) ("[W]e will not strike down restrictions solely because we can envision a less restrictive or more effective means of furthering [legitimate] interests.")

Plaintiff argues the ordinances are not content-neutral, having been specifically designed to suppress the speech content of its nude dancers and, even if the ordinances are not content-based, that the methods utilized to address secondary effects are overly burdensome. Insofar as Plaintiff's first allegation is concerned, the Seventh Circuit Court of Appeals has held that content-based ordinances may nevertheless be treated as content-neutral if they meet the three requirements outlined in the Ward

and Renton cases above. See Schultz v. City of Cumberland, 228 F.3d 831, 845 (7th Cir. 2000)

Defendant's ordinances do not impermissibly infringe Plaintiff's First Amendment rights. The ordinances are easily justified without reference to speech content. The question is whether Defendant could reasonably believe the numerous studies indicating the connection between adult-oriented businesses and secondary effects over Plaintiff's rebuttal study, to which the answer is undoubtedly yes. See City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728, 1736 (2002) ("[A] municipality may rely on *any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." (emphasis added; citations omitted)). Although Plaintiff presents evidence of a study bringing into question the studies Defendant relied upon in enacting its ordinances, as well as affidavits from local law enforcement attesting to the lack of secondary effects caused by the club, these documents fail to raise a genuine fact issue that allows this case to proceed to trial. To hold otherwise would improperly substitute the

Court's judgment for that of Defendant's governing representatives. Furthermore, where Plaintiff's club has yet to cause the secondary effects Defendant is concerned about, Defendant can nevertheless prospectively legislate to prevent such secondary effects from coming to fruition. Such was the case in Renton, where the city enacted an ordinance governing adult-oriented businesses before any located within the city.

Furthermore, the ordinances clearly are narrowly tailored to address Defendant's concerns over secondary effects while leaving open alternative means for Plaintiff to convey a message via erotic dancing. They do not, unlike the ordinance upheld in City of Erie, completely ban partial or full nude dancing, but simply impose requirements on the place iii' which such dancing occurs. "[El yen {f [a complete] public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped ..[alny effect on the overall expression is *de minimis.*" City of Erie, 529 U.S. at 294. Plaintiff is free to continue presenting partial or even full nude dancing, so long as it does not allow liquor on the premises

and maintains a five foot space between the dancers and patrons. Likewise, if Plaintiff wishes to serve liquor, its dancers must wear pasties and a G-string. This is a minimal requirement that provides very little to the imagination of Plaintiff's patrons. If an across-the-board requirement of a G-string and pasties has at most a *de miniinis* effect on erotic expression, the less-stringent requirements of the ordinances presently at issue clearly pass constitutional muster. They properly address Defendant's concerns with secondary effects while not unduly hampering Plaintiff in conveying its message of exotic dancing.

Accordingly, the ordinances are constitutional and Defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that Defendant's motion for summary judgment is GRANTED

I

App. 23

IT IS FURTHER ORDERED that judgment will be entered in favor of Defendant dismissing Plaintiff's complaint and all claims contained therein.

Entered this ~ day of January, 2003.

BY THE COURT

John C. Shabaz
District Judge

App. 24

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
February 9, 2004

Before

Hon. JOEL M. FLAUM, Chief Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. ANN CLAIRE WILLIAMS, Circuit Judge

GM ENTERPRISES, INCORPORATED.

Plaintiff-Appellant,

v.

TOWN OF ST. JOSEPH, WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No.02 C 396
John C. Shabaz,
Judge.

App. 25

ORDER

On consideration of the petition for rehearing and petition for rehearing en bane filed in the above-entitled case on December 15, 2003, by plaintiff-appellant. no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

UNITED STATES CONSTITUTION, AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT 14, SEC. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MINUTES of the TOWN BOARD
June 21, 2001

Chair Collins CALLED the meeting to ORDER at 7:06 p.m. The PLEDGE of ALLEGIANCE and STATEMENT of PUBLIC NOTICE were recited. A **motion** (Dunn) carried, to ADOPT the AGENDA as posted. ROLL CALL included Chair Collins, Supervisors Marty and Dunn, Treasurer Grant and Clerk Schmit, plus 22 citizens and guests.

REPORTS included CDO draft design being complete and being submitted for the Planning Board to review; Supervisor Marty attended Joint Finance Committee Meeting and reported on the noticeable budget cuts and deficit plans for state and local highway funding.

7:15 Supervisor Lenzen arrived

DATES OF UPCOMING MEETINGS / EVENTS were reviewed.

ACTION ITEMS

- The upcoming newsletter was discussed briefly.
- A motion (Marty) to approve a Small Gathering Permit with extension of premises for Willow River Saloon (Chicken & Corn Feed Aug 5), amended (Dunn) to state the time period that this permit would be in effect would be from 9 a.m. to 6 p.m. on August 5~ and that an adequate number of satellite toilet facilities be provided to accommodate the number of attendees, carried. Further discussion regarding the hours of operation for the extension of premises ensued. in light of the information gathered Chair Collins allowed the earlier amendment to be withdrawn and a motion to **amend** (Dunn) carried, that we would establish 9 a.m. to 9 p.m. on Sunday August 5, 2001 as the operating hours for the special permit for a small gathering on the exterior premises of the Willow River Saloon Inc.

App. 28

7:25 Supervisor Gavin arrived

ACTION ITEMS cont'd

- A **motion** (Lenzen) to approve Provisional and/or Operator's licenses pending clear records checks for Christopher Mikulski, Joy Nicholson, Stephanie Cudd, Paul Marcello, Elizabeth Hansen, Jeremiah Sindelar and Joshua Ekar, carried.
- A motion (Marty) to approve the fireworks display request for City of Stillwater July 4th 2001 and July 5th 2001 contingent on [meeting] last years requirements, carried.
- Grand Prix, Victory Fireworks, A & R Fireworks resubmitted applications for fireworks resale and some were in attendance to speak to their request. Following audience discussion a **motion** (Collins) to deny fireworks resale applications for Grand Prix, Victory Fireworks and A & R Fireworks because of the health, safety and welfare concerns that the town and residents have, specifically issues concerning parking, traffic congestion and traffic safety, fire protection and injuries due to the use of fireworks, carried.
- A **motion** (Lenzen/Dunn) to establish Ordinance 2001-02, to amend the town Code by adding a new chapter, to be entitled Sexually Oriented Business.., evolved into numerous public comments. A **motion** (Gavin/Marty) to amend, by adding the wording that the ordinance would become effective on Wednesday January 2, of the year 2002, allowing some latitude to prepare for the transition of the type of business he would like to be running and to get through New Years Eve and become effective on the first "business day" of the new calendar year, failed. The original **motion** carried.

  Chapter 153, SEXUALLY ORIENTED BUSINESSES § 153-1. Determinations.

  Whereas, the Town Board finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and whereas, the concern over sexually transmitted diseases is a legitimate health concern of the Town Board, which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and whereas, there is convincing documented evidence that sexually oriented businesses have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading

of property values; and whereas, the Town Board desires to minimize and control these adverse secondary effects and thereby protect the health, safety and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and whereas, it is not the intent of this chapter to suppress any speech activities protected by the First Amendment but to enact a content-neutral chapter which addresses the negative secondary effects of sexually oriented businesses; and whereas, it is not the intent of the Town Board to condone or legitimize the distribution of obscene material, and the Town Board recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state law enforcement officials to enforce state obscenity statutes against any such illegal activities in the Town of St. Joseph; now, therefore, the Town Board of the Town of St. Joseph ordains as follows.

§ 153-2. Intent.

It is the intent of this chapter to regulate sexually oriented businesses and related activities in order to ameliorate the negative secondary effects associated with such businesses so as to promote the health, safety and general welfare of the citizens of the Town of St. Joseph. It is not intended that the provisions of this chapter directly or indirectly impose limitations or restrictions on the content of any communicative materials, including sexually oriented materials, nor is it the intent of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment of the Constitution of the United States or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Further, it is not the intent of this chapter to condone or legitimize the distribution of obscene materials.

§ 153-3. Findings.

The Town of St. Joseph relies upon evidence concerning the adverse secondary effects of sexually oriented businesses on the community as reported in the following cases of City of Erie v. Pap's A.M., 120 5. Ct. 1389 (2000); City of Renton v. Playtime Theaters, Inc., 475

U.S.C. § 41(1986); Young v. American Mini Theaters, 426 U.S.C. § 50 (1976); and Barnes v. Glen Theatre, Inc., 501 U.S.C. § 560 (1991); Arcara v. Cloud Books, Inc., 478 U.S.C. § 697 (1986); California v. LaRue, 409 U.S.C. § 697 (1972); Iacobucci v. City of Newport, Ky, 479 U.S.C. § 92 (1986); United States v. O'Brien, 391 U.S.C. § 367 (1968); DLS, Inc. v. City of Chattanooga, 107 F.2d 403 (6th Cir. 1997); Key, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986); Hang on, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995); South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); East of the River Enterprises II v. City of Hudson, 2000 Wis. App. Lexis 734 (Ct. App. August 1, 2000); and Urmanski v. Town of Bradley, 2000 WI App. 141, 613 N.W.2d 905 (Ct. App. 2000); and upon studies conducted in numerous cities, such as Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas, among others. It further relies upon the findings reported in Regulation of Adult Entertainment Establishes in St. Croix County, Wisconsin, findings reported in the Final Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota) and statistics reported by the Centers for Disease Control and Prevention. Therefore, the Town of St. Joseph finds that:

A. Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

B. Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.

C. Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.

D. Sexually oriented businesses may encourage, support and facilitate prohibited secondary sexual activities such as prostitution.

E. The consumption of alcoholic beverages on the premises of sexually oriented businesses exacerbates the negative secondary effects of such businesses on the community.

F. There is an increase in the potential for infiltration by organized crime for the purposes of unlawful conduct. § 153-4. Definitions.

The following terms shall have the following meanings:

ADULT ARCADE - Any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically,

electrically or mechanically controlled still or motion-picture machines, projectors or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time and where the images so displayed are distinguished or characterized by the depicting or describing of specified sexual activities or specified anatomical areas.

ADULT BOOKSTORE or ADULT VIDEO STORE - An establishment which, as its substantial course of business, presents adult entertainment for observation by patrons therein or which, as part of its substantial course of conduct, offers for sale, rent, trade, lease, inspection or viewing books, films, videocassettes, magazines or other such media which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities; or instruments, devices or paraphernalia that are designed for use in connection with specified sexual activities. A commercial establishment may have other principal business purposes that do not involve the offering for sale or for rent of material as defined above and still be categorized as an adult bookstore or adult video store. Such other business purpose will not serve to exempt these commercial establishments from being categorized as adult bookstores or adult video stores so long as one of the principal purposes is the offering for sale or rent for consideration the specified materials that depict or describe specified sexual activities or specified anatomical areas. A principal business purpose need not be a primary use of an establishment so long as it is a significant use based upon the visible inventory or commercial activity of the establishment.

A. Substantial means 40% or more of a business stock in trade, display space, floor space or retail sales in any one month. Upon reasonable belief that an entity is in excess of the forty-percent threshold, that entity shall provide all necessary records, receipts and documentation to the town upon request. Failure to do so shall result in a presumption that the entity is operating in excess of the threshold.

ADULT CABARET - A nightclub, dance hall, bar, restaurant or

similar commercial establishment that regularly features:

A. Persons who appear in a state of nudity or semi-nudity; or

B. Live performances that are characterized by specified sexual activities; or

C. Films, motion pictures, videocassettes, slides or other photographic reproductions that are characterized by the depiction or description of specified sexual activity or nudity or specified anatomical areas.

ADULT ENTERTAINMENT - Any exhibition of any motion picture, live performance, display or dance of any type which has as a significant or substantial portion of such performance or is distinguished or characterized by an emphasis on any actual or simulated performance of specified sexual activities or exhibition and viewing of specified anatomical areas.

ADULT ESTABLJSHIV1ENT - An adult arcade, adult bookstore, adult cabaret, adult motion-picture theater, adult theater, adult video store and further means any premises to which public patrons or members are invited or admitted that is substantially devoted to the purveyance, demonstration or display of specified sexual activities or specified anatomical areas.

ADULT MOTION-PICTURE THEATER - A commercial establishment where, for any form of consideration, films, motion pictures, videocassettes, slides or similar photographic reproductions are regularly shown that are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

ADULT THEATER - A theater, concert hail, auditorium or similar commercial establishment that regularly features persons who appear in person in a state of nudity and/or semi-nudity and/or live performances that are characterized by the exposure of specified anatomical areas or by specific sexual activities.

A. 'Regularly" means on a daily, weekly, monthly, semimonthly or bimonthly basis as part of the ongoing scheduled activities of the establishment.

EMPLOYEE - A person who performs any service on the premises of a sexually oriented business on a full-time, part-time, contract or independent basis, whether or not the person is denominated an employee, independent contractor, agent or otherwise, and whether or not the said person is paid a salary, wages or other compensation by the operator of said business. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or equipment on the premises nor does employee include a person exclusively on the premises as a patron or customer.

ENTERTAINER:

A. Any person who appears in a sexually oriented business in a state of nudity or semi-nudity in a sexually oriented business; or

B. Any person who engages in live performances that are characterized by specified sexual activities or the exposure of specified anatomical areas.

ESTABLISHMENT - Includes any of the following:

A. The opening or commencement of any sexually oriented business as a new business.

B. The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business.

C. The additions of any sexually oriented business to any other existing sexually oriented business.

D. The relocation of any sexually oriented business.

E. A sexually oriented business or premises on which the sexually oriented business is located.

NUDE, NUDITY or STATE OF NUDITY - The exposure of any specified anatomical areas as defined in this chapter.

OPERATOR - The person on the premises who is responsible for the control and management of the sexually oriented business.

PERSON - An individual, proprietorship, partnership, corporation, association or other legal entity.

PLACES IN SEXUALLY ORIENTED BUSINESSES THAT ARE PROVIDED OR SET APART FOR NUDITY

- Enclosed single sex public restrooms, enclosed single sex functional shower, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations and similar places in which nudity or exposure of specified anatomical areas is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein. This term shall not be deemed to include places where a person's conduct of being nude is used for his or her profit or where being nude is used for the promotion of business or is otherwise commercially exploited.

PREMISES - The real property upon which the sexually oriented

business is located and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control or supervision of the owner or operator of the business.

REGULARLY - Recurring on a basis which is frequently, customarily or typically a part of the ongoing scheduled activities of the establishment.

SEMINUDE OR SEMI-NUDITY - The exposure of the nipples or areolas of the female breast less than completely and opaquely covered.

SEXUALLY ORIENTED BUSINESS - An adult bookstore, adult establishment, adult motion-picture theater, adult video store, adult cabaret or a business featuring adult entertainment, adult motion-picture theater, adult theater or other business classified as an adult establishment.

SPECIFIED ANATOMICAL AREAS:

A. The human male genitals in a discernible turgid state, even if fully and opaquely covered; or

B. Less than completely and opaquely covered human genitals, pubic region, anus, anal cleft or cleavage; or

C. Less than completely and opaquely covered nipples or areolas of the human female breast. SPECIFIED SEXUAL ACTIVITIES - Includes any of the following:

A. The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts, whether covered or uncovered.

B. Sex acts, actual or simulated, including intercourse, oral copulation, sodomy, masturbation, necrophilia, sadomasochistic abuse, fellatio or cunnilingus.

C. Showing human genitals in a state of sexual stimulation or arousal.

D. Excretory functions as part of or in connection with any of the activities set forth in Subsections A through C above.

§ *153-5.* Regulation of sexually oriented businesses.

A. No person, employee, entertainer or patron shall be permitted to have any physical contact with any entertainer on the premises of a sexually oriented business during any performance. To prevent actual physical contact between the entertainer and any other person, employee or patron, all performances shall only occur on a stage or on a table that is elevated at least 18 inches above the immediate floor level and shall not be less than five feet from any area occupied by any patron. Patrons shall not have any physical contact with and shall not be less than five feet from any entertainer during any

performance, including, but not limited to, during the payment of a tip or gratuity.

B. The sale, use or consumption of alcoholic beverages on the premises of a sexually oriented business is prohibited.

C. It shall be unlawful to allow a person who is younger than 18 years of age to enter or be on the premises of a sexually oriented business at any time the sexually oriented business is open for business.

D. It shall be the duty of the operator of each sexually oriented business to ensure that an attendant is stationed at each public entrance to the sexually oriented business at all times during regular business hours. It shall be presumed that an attendant knew a person was under the age of 18 unless such attendant asked for and was furnished:

(I) A valid operator's, commercial operator's, or chauffeur's driver's license; or

(2) Personal identification card issued by the State of Wisconsin reflecting that such person is 18 years of age or older.

E. No person shall cause another to commit a violation of this chapter, nor shall any person permit such a violation to occur on any premise under his/her control, tenancy, management or ownership.

F. Hours of operation. No sexually oriented business regulated by this chapter may remain open between the hours of 2:00 a.m. and 8:00 a.m., Monday through Friday, or between the hours of 2:30 a.m. and 8:00 a.m. on Saturdays and Sundays.

U. Signs posted. All Premises governed by this chapter shall be required to post signs provided by the Town of St. Joseph which state:

By Town of St. Joseph Ordinance: The use or consumption of alcoholic beverages on these premises is prohibited. No person shall be permitted to have any physical contact with any entertainer. No person shall be less than five feet from any entertainer, including during the payment of tips. Violators maybe subject to a fine of not less than $200 and not more than $700 per violation.

H. Doors. Each entryway to a sexually oriented business featuring

live entertainment shall, through use of a vestibule, screening or double doors and with window coverings, eliminate any direct line of sight from the public street area to any entertainer on the premises.

§ *153-6.* Exemptions.

A. The provisions of this chapter do not apply to the following establishments: theaters, performing arts centers, civic centers and dinner theaters where live dance, ballet, music and dramatic performances of serious artistic, social or political merit are offered on a regular basis and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or seminude performances. While expressive live nudity may occur within these establishments, this chapter seeks only to minimize and prevent the secondary effects of sexually oriented businesses on the community. Negative secondary effects have not been associated with these establishments.

B. Places in sexually oriented businesses that are provided or set apart for nudity, provided that:

(1) Persons appearing nude in a place provided or set apart for nudity do so for the sole purpose of performing a lawful function(s) that is customarily intended to be performed within such place provided or set apart for nudity; and

(2) Persons appearing nude in a place provided or set apart for nudity are not nude for the purpose of directly or indirectly obtaining money or other financial gain for such person or for another person or entity.

§ *153-7.* Violations and penalties.

A. Violation of the use provisions of § 153-5 is declared to be a public nuisance per se which, in addition to any other remedy provided by law, may be abated by the Town Board or its designee by way of civil abatement procedures.

B. Any person, partnership or corporation who violates any of the provisions of § 153-5 of this chapter shall be subject to a forfeiture of not less than $200 and not more than $700 per violation. A separate offense and violation shall be deemed committed on each day on which a violation occurs or continues to occur.

C. Violation of this chapter constitutes sufficient grounds for suspending, revoking or nonrenewing an alcohol beverage license under W.S.A. s. 125.12.

- A motion (Lenzen/Marty) to adopt Ordinance 2001-03, amending the Code of the Town of St Joseph

Chapter 114 Intoxicating Liquor and Malt Beverages, carried.
AN ORDINANCE PROHIBITING LIVE, TOTALLY NUDE, NON-OBSCENE, EROTIC DANCING IN
ESTABLISHMENTS LICENSED TO SELL ALCOHOL BEVERAGES AND CREATING AN EXCEPTION
FROM SUCH PROHIBITION FOR THEATERS, CIVIC CENTERS, PERFORMING ARTS CENTERS, AND
DINNER THEATERS WHERE LIVE DANCE, BALLET, MUSIC AND DRAMATIC PERFORMANCES OF
SERIOUS ARTISTIC MERIT ARE OFFERED ON A REGULAR BASIS.

WHEREAS, the Town Board of the Town of St. Joseph has explicit authority under Sec. 125.10(1), Wis. Stats., to adopt regulations governing the sale of alcohol beverages which are in addition to those set forth in Ch. 125, Wis. Stats., and, WHEREAS, the Town Board has village powers under Sec. 60.lO(2)(c), Wis. Stats., that grants general police powers as set forth in Sec. 61.34(1), Wis. Stats., to act for the good order of the Town, for its commercial benefit and for the health, safety and welfare of the public; and may carry out its powers by regulation and suppression; and, WHEREAS, the Town Board recognizes it lacks authority to regulate obscenity in light of Sec. *66.05* 1(3), Wis. Stats., and does not intend by adopting this ordinance to regulate obscenity, since nudity in and of itself is not obscene, it declares its intent to enact an ordinance addressing the secondary effects of live, totally nude, non-obscene, erotic dancing in bars and taverns; and, WHEREAS, bars and taverns featuring live totally nude, non-obscene, erotic dancing have in other communities tended to further the increase of criminal and other offensive activity, to disrupt the peace and order of the communities, to depreciate the value of real property,

to harm the economic welfare of the communities and to negatively affect the quality of life of the communities, and such secondary effects are detrimental to the public health, safety and general welfare of citizens; and, WHEREAS, the Town Board recognizes the

U.S. Supreme Court has held that nude dancing is expressive conduct within the outer perimeters of the First Amendment to the United States Construction and therefore entitled to some limited protection under the First Amendment, and the governing body further recognizes that freedom of speech is among our most precious and highly protected rights, and wishes to act consistently with full protection of those rights; and, WhEREAS, however, the Town Board is aware, based on the experiences of other communities, that bars and taverns in which live, totally nude, non-obscene, erotic dancing occurs may and do generate secondary effects which the Town Board believes are detrimental to the public health, safety and welfare of the citizens of the Town of St. Joseph; and, WHEREAS, among these secondary effects are: (a) the potential increase in prostitution and other sex-related offenses, as well as other crimes and offenses, (b) the potential depreciation of property values in neighborhoods where bars and taverns featuring nude dancing exist, (c) health risks associated with the spread of sexually transmitted diseases, and (d) the potential for infiltration by organized crime for the purpose of unlawful conduct; and, WHEREAS, the Town Board desires to minimize, prevent and control these adverse effects and thereby protect the health, safety and general welfare of the citizens of the Town of St. Joseph; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and, WHEREAS, the Town Board has determined that the enactment of an ordinance prohibiting live, totally nude, non-obscene, erotic dancing in bars and taverns licensed to serve alcohol beverages promotes the goal of minimizing, preventing and controlling the negative secondary effects associated with such activity. NOW, THEREFORE, THE TOWN BOARD OF THE TOWN OF ST. JOSEPH ORDAINS AS FOLLOWS: Chapter 114 of St. Joseph Code of Ordinances is amended to add the following ARTICLE VI: § 114-16. NUDE DANCING IN LICENSED ESTABLISHMENTS PROHIBITED

A. Prohibition. It is unlawful for any person to perform or engage in, or for any licensee or manager or agent of the licensee to permit any person, employee, entertainer or patron to perform or engage in any live act, demonstration, dance or exhibition on the premises of a licensed establishment which:

(1) Shows his/her genitals, pubic area, vulva, anus, anal clef or cleavage with less than a fully opaque covering; or, (2) Shows the

female breast with less than a fully opaque covering of any part of the nipple and areola; (3) Shows the human male genitals in a discernibly turgid state, even if fully and opaquely covered;.

B. Exemptions. The provisions of this ordinance do not apply to the following licensed establishments or portions of licensed establishments:

(1) Licensed theaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music and dramatic performances of serious artistic merit are offered on a regular basis and in which the predominant business or attraction is not the offering to customers of entertainment which is intended to provide sexual stimulation or sexual gratification to such customers and where the establishment is not distinguished by an emphasis on, or the advertising or promotion of, nude erotic dancing;

(2) Places In Licensed Establishments that are Provided or Set Apart for Nudity provided that:

(a) Persons appearing nude in a Place Provided or Set Apart for Nudity does so for the sole purpose of performing lawful function(s) that is customarily intended to be performed within such Place Provided or Set Apart for Nudity; and (b) Persons appearing nude in a Place Provided or Set Apart for Nudity is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity.

(3) A performance(s) in a licensed establishment of a work(s) of serious literary or artistic merit where the performance is not intended for the sexual interest or titillation of customers and where the performance is not distinguished by an emphasis on or the advertising or promotion of nude performances.

C. Definitions. As used in this ordinance, the following terms shall have the meanings indicated:

(1) Licensed Establishment means any establishment licensed by the Town Board of the Town of St. Joseph to sell alcohol beverages pursuant to Ch. 125, Wis. Stats. (2) Licensee means the holder of a retail "Class A", "Class Class "B", Class "A", or "Class C" license granted by the Town Board of the Town of St. Joseph pursuant to Ch. 125, Wis. Stats. (3) Places In Licensed Establishments That Are Provided Or Set Apart For Nudity means enclosed single-sex public restrooms, enclosed single sex functional shower, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy

constitutionally protected therein. This term shall not be deemed to include places where a person's conduct of being nude is used for his or her profit or where being nude is used for the promotion of business or is otherwise commercially exploited. (4) Nude or Nudity means the showing of human male or female genitals, pubic area, vulva, anus, anal clef or cleavage with less than a fully opaque covering; the showing of the female breast with less

than a fully opaque covering of any part of the nipple and areola; the showing of the human male genitals in a discernible turgid state, even if fully and opaquely covered.

D. Penalties. Any person, partnership, or corporation who violates any of the provisions of this ordinance shall be subject to a forfeiture of not less than $250.00, and not more than $500.00 per violation. A separate offense and violation shall be deemed committed on each day on which a violation occurs or continues. In addition, violation of this ordinance constitutes sufficient grounds for suspending, revoking or non-renewing an alcohol beverage license under sec. 125.12, Wis. Stats.

Severability. If any section of this ordinance is found to be unconstitutional or otherwise invalid, the validity of the remaining sections shall not be affected.

Effective Date. This ordinance shall take effect upon passage and publication as required by law.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WISCONSIN

GM Enterprises, Inc.,

Plaintiff

AFFIDAVIT OF DANIEL LINZ

vs.

Town of St. Joseph, Wisconsin,

Defendant.

Court File No. 02 Civ,03 96-S

STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

Daniel Linz, being first duly sworn on oath hereby deposes and says the following:

1. My legal name is Daniel Linz and I have personal knowledge of the facts stated herein. I am a Professor in the Department of Communication and Law and Society Program at the University of California, Santa Barbara, and I am also the

former Director of the University of California, Santa Barbara, Survey Research Center. I have degrees in both sociology and psychology, and I teach, among other things, research methodology. My curriculum vitae is attached hereto as Exhibit 1, and accurately reflects my teaching positions, the honors and awards that I have received, the papers that I have either authored or co-authored which have been published in peer-reviewed journals, my professional activities, research grants that I have received, professional conferences where I have presented various papers, invited addresses where I have spoken, and public testimony that I have given.

2. Two of my areas of concentration concern violence in the media and its effects on both adults and children, and the effects of sexually-related expression. In addition to my review of the secondary effects "studies" and information (see Exhibit A attached to the original Tigue affidavit), I have either conducted or have overseen a number of studies in regard to examining whether 'adult" entertainment facilities engender negative secondary effects. One of the studies that I oversaw, an

examination of adult cabarets in the City of Ft. Wayne, Indiana, which serve alcoholic beverages and provide exotic entertainment recently received an award from the United States Department of Justice for crime mapping.

3. I have been asked to render certain opinions in this case in regard to the "secondary effects" justification for ordinances No. 2001-2 and 200 1-3 adopted by the Town board of the Town of Saint Joseph.

4. I was previously provided, and reviewed in detail, the studies which the Town of Saint Joseph purported to rely upon in enacting its ordinances

5. I have been asked the question of whether, in my opinion, there was any evidence provided to the Town at the time of enactment of the ordinances which the Town could have reasonably relied upon to enact this ordinance.

6. From my review it appears that the Town of Saint Joseph relied upon the following secondary effects

"studies"--City of Austin, Texas; Dallas, Texas; Newport News, Virginia; Oklahoma City, Oklahoma; Los Angeles; Town of Islip, New York; City of New York, New York; Phoenix, Arizona; Amarillo, Texas;, Times Square Area, New York; St Croix, Wisconsin; Whittier, California; Cleveland, Ohio; Tucson, Arizona; summaries by the National Law Center for Children and Families and the Report of the Attorney General of Minnesota.

7. I am familiar with the secondary effects information from other cities purportedly relied upon by the Town of Saint Joseph, and I reviewed and analyzed most, if not all of those materials prior to being provided with the discovery in this matter. A number of years ago, I undertook an exhaustive research project in regard to "secondary effects" materials utilized as a basis for the enactment of legislation directed at "adult" entertainment, which subsequently was used to prepare a paper submitted to the United States Supreme Court in the case of City of Erie v. Pap's, A.M., 529 U.S. 277, 146 L.Ed.2d 265, 120 S.Ct. 1382 (2000), and was ultimately published as Governmental Regulation of "Adult" Businesses Through Zoning and Anti-

Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, Paul, et al., Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391, (hereinafter *"Paul")* attached as Exhibit A to the original Tigue affidavit.

8. My research in the area of secondary effects has included attempts to compile and critically analyze most if not all of the "secondary effects studies" which are referred to in case law and which are generally referred to in preambles to laws which attempt to, in one fashion or another, regulate and/or license "adult" entertainment facilities.

9. I initially collected some one-hundred twenty "studies," and analyzed them both in regard to the conclusions that they reached and for what I generally refer to as "methodological rigor." As part of my research, I wanted to insure that if studies reached a certain conclusion (regardless of whether they found or did not find "secondary effects" being associated with "adult" entertainment businesses), I or others could have some confidence in those results as being trustworthy and reliable.

I therefore undertook, along with my assistant, Ph.D. candidate Bryant Paul, a critical examination of the methodology or methodologies employed in these various "studies" in order to determine whether they met the rudimentary scientific elements of trustworthiness.

10. When my and Mr. Paul's initial review and analysis of the large body of secondary effects studies and information was completed, we prepared a paper in regard to our observations that was submitted as part of an Amicus Curiae brief on behalf of the First Amendment Lawyers' Association to the United States Supreme Court for its consideration in the P~n~ case, ultimately published at 120 S.Ct. 1382 (2000). In that case, I was not retained by the respondent, Pap's, A.M., to undertake any particularized research in the City of Erie, Pennsylvania. Rather, I merely provided my observations and conclusions to the amicus curiae First Amendments Lawyers' Association. The comments of Justice O'Connor, as author of the four-member plurality opinion, and of Justice S outer in his partial concurrence and partial dissent, are referring to my paper attached to the First

Amendment Lawyers' Association brief.

11. Following presentation of that information to the Supreme Court, we presented our findings in a paper submitted at the Annual Meeting of the International Communication Association, 2000, with that paper receiving a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. Our analysis was then subjected to further peer-review for consideration of publication of what ultimately resulted as the article in the academic journal Communication Law & Policy.

12. In our published paper we develop list of criteria that we believed are critical in order for evidence of adverse secondary effects to meet the standards of scientific reliability as defined by this Court in *Daubert v. Merrell Dow,* 509 U.S. 579 (1993). *See, e.g., Paul, etal.,* at 355-391.

13. Studies of secondary effects should be examined in order to determine whether they answer or violate the

14. I reviewed those criteria laid out the briefs to the Supreme Court and the peer reviewed published article once again for the present case.

15. With few exceptions the methods used in the studies relied on by Saint Joseph do not adhere to professional standards of scientific inquiry necessary in order to insure methodological integrity and thus the validity of a study. The investigation that is scientifically credible, the St. Paul, Minnesota [1978] study, demonstrates no negative secondary effects associated with adult businesses and arguably a reversal of the presumed negative effect.

16. In addition to the studies reviewed in my report in the Tigue exhibit, I have examined the other studies relied on by the Town of Saint Joseph and will comment on them here.

17. These studies, in my opinion, also do not adhere to professional standards of scientific inquiry necessary in

following principles: (1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them answers they wanted to hear?" These criteria are neither difficult nor cumbersome to apply, nor are they novel in nature.

13. Following publication of this paper we also prepared a paper in regard to our observations that was submitted as part of an Amicus Curiae brief on behalf of the First Amendment Lawyers' Association to the United States Supreme Court for its consideration in the **Alameda** case, ultimately published at 122 S.Ct. at 1728 (2002). In that case, I was also not retained by the respondent, Alameda Books, to undertake any particularized research in the City

of Los Angeles. Rather, as with Pap's I merely provided my observations and conclusions to the amicus curiae First Amendments Lawyers' Association.

order to insure methodological integrity and thus the validity. The suffer from the methodological flaws noted above: 1) They often do not ask the "compared to what?" question; 2) it is impossible to tell if the findings regarding crime are a one-time fluke; 3) crime is not measured according to a reliable source and often the government went looking for more crime to justify its legislation; and (4) the investigators talked only to a biased sample of people or to people who would give them answers they wanted to hear. Finally, as with the studies cited in the paper included in the original Tigue affidavit, in many cases the authors of the studies themselves disavow finding adverse secondary effects.

Let me consider in detail one example study cited by the Town of Saint Joseph--the New York Study, The New York Study failed to properly match control and test (adult) areas in order to insure reliable comparisons

between the two for either crime rates or property values, In order to insure that accurate and fair comparisons are being considered, a control or comparison area must be selected that is truly "equivalent" to the area(s) containing the adult entertainment

business(es). We have previously elaborated on the factors that may ensure equivalence and the calculation of an error rate in the test of differences between the adult and control areas. *Paul,* at 373. This lack of methodological reliability prevents the Town from drawing reliable conclusions.

16. New York City admits the same in its own summary of property value and crime activity analyses. The Times Square Business Improvement District collected data for property values for the 1985/86 and 1993/94 years. Study concluded while it may be that the concentration of adult use establishments has a generally depressive effect on adjacent properties.. .we do not have sufficient data to prove or disprove this thesis." (pg. 41). Similarly, the Police Department provided the Department of City Planning with information about criminal complaints drawn from precinct files (pg 52). The Study concludes: "In summary, it was not possible to draw definitive conclusions from the analysis of criminal complaints. Land uses other than adult entertainment establishments, e.g., subway station access, appear to have a far stronger relationship to criminal complaints. It was not possible to

isolate the impact of adult uses relative to criminal complaints." (pg 54.).

17. The remaining studies suffer from the same flaws. The City of Austin Study is fundamentally flawed because of the biased selection procedures used to determine which adult business locations were suitable for study. From a total of 49 potential adult sites, the study authors eliminated 43 of these potential study sites because they anticipated that there would not be clear demonstrations of negative effects (including eliminating some businesses
because the "transient population associated with the University of Texas might unduly influence the results of the evaluation" pg. 11).

18. The Dallas Study included a set of interviews with real-estate appraisers. No data on actual housing prices or housing appreciation was collected. The survey of these professionals did not meet even minimal professional requirements for survey research. Further, the police department

call logs for calls for service to adult business locations for a four-year period were not compared to matched control locations that did not include adult business.

19. The Newport News, Virginia Study did not employ a long enough time period to rule out the possibility of a one time fluke. Less than two years worth of police calls for service were analyzed in this study.

20. The Oklahoma City Study included a survey of real-estate appraisers. It was not conducted according to scientific standards for survey research and had an exceptionally low response rate. Further, there was no call for service to the police or crime data examined in the study.

21. The St Croix "study" is not an empirical study per se. instead, the report is a summary of other cities investigations and a discussion of possible policy options.

22. The findings of the Whittier Study are qualified by the authors' of the study who express doubt about their conclusions. The authors warn: "not all of it(the data) can be isolated as being directly related only to the presence of adult businesses because of a variety of factors influencing the study areas over the last ten years" (pg. 3).

23. The Cleveland "study" is not an empirical study of crime or calls for service to the police. Instead, it is the summary of a recounting of several incidents by the police concerning selected times they encountered crime at adult locations at a symposium moderated by anti-pornography crusader Bruce Taylor. There is no comparison information presented for the police reports mentioned at the symposium.

24. The Tucson, Arizona "study" is not an empirical investigation.

25. The National Law Center report contains

summaries of studies undertaken by an advocacy group interested in suppressing the activities of adult businesses throughout the country.

26. The Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (Minnesota, June 6, 1989) represents a highiy selected reading of studies undertaken by other communities, times stating conclusions about the existence of secondary effects that are disavowed by the authors of the studies themselves upon a close reading (e.g., the 1978 St Paul Study). This Report often ignores admonitions by the authors themselves either severely qualifying or disavowing findings of adverse secondary effects. The Report is symptomatic of the problems with all of the studies reviewed above. All of the studies that claim to show adverse secondary effects are lacking in methodological rigor. The studies that have been done either by government agencies or by private individuals that have employed the proper methodological rigor have universally concluded that there are no adverse secondary effects.

27. It is also my opinion that contrary to the assumptions of the courts, the content of the messages conveyed by the dancers is significantly altered by restrictions placed on dancer nudity and dancer patron proximity.

28. My opinion is based on the results of a field experiment conducted in order to test the assumptions made by the Supreme Court in Barnes v. Glen Theatre, Inc. (1991) and the Ninth Circuit of Appeals in Colacurcio v. City of Kent (1999) that government restrictions on dancer nudity and dancer-patron proximity do not affect the content of messages conveyed by erotic dancers

29. In the field experiment dancer nudity and dancer proximity were manipulated under controlled conditions in an adult nightclub; and male patrons viewed the dances and completed questionnaires assessing affective states and reception of erotic,

relational intimacy, and social messages.

Daniel Linz

App. 58

EXHIBIT C

PAPER ON THE APPLICABILITY OF THE 1977 LOS ANGELES SECONDARY EFFECTS STUDY AS A BASIS TO JUSTIFY THE PRECLUSION OF "MULTIPLE USE" ADULT BUSINESSES, AND AN ANALYSIS OF MORE RECENTLY CONDUCTED "SECONDARY EFFECTS" STUDIES.

BY:
DR. DANIEL LINZ, Ph.D.[*]
AND
BRYANT PAUL[**]

PRESENTED IN SUPPORT OF THE AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT LAWYERS ASSOCIATION

INTRODUCTION

In its decision now under review by this Court, the Ninth Circuit ruled that the City of Los Angeles had a substantial governmental interest in reducing neighborhood crimes that were presumably associated with the existence of "adult" businesses. *Alameda Books, Inc. v. City of Los Angeles,* 222 F.3d 719 (9th Circuit 2001), *cert. granted.*

The primary evidence propounded by Los Angeles to establish this concern, and to then justify a subsequent prohibition of "multiple use" adult businesses, was a 1977 study undertaken at the request

---

[*]Professor, Department of Communication and Law and Society Program, University of California, Santa Barbara.
[**] Ph.D. Candidate, Department of Communication, University of California, Santa Barbara.

of the City Council by the city's Department of Planning in cooperation with the local police department.

At issue for the Ninth Circuit was the question of whether the latter regulations devised by the City were designed to serve this governmental interest. In the case now before it, the Court will examine just what interests are implicated by the 1977 LA Study, and evaluate whether the Study could factually serve as a basis for enacting the 1983 ordinance amendments that prohibit the establishment of "combination" businesses.

In this paper, we attempt to aid the Court in examining these questions, while also seeking to provide further information to the Court concerning its more general consideration of the "secondary effects" doctrine.

Our analysis consists of the following:

First, we establish that the most frequently cited secondary effects studies, including the 1977 Los Angeles Study, show no objective evidence of a relationship between the existence and/or concentration of adult businesses and negative secondary effects. This raises the question of whether there is an appropriate foundation for enacting, under the justification moniker of "secondary effects," an ever-widening array of regulations directed at "adult" businesses.

Second, we set forth certain scientific, and indeed common sense, criteria that we believe should be used in order to evaluate whether any specific "secondary effects" study can be expected to have sufficient trustworthiness so that its results can be reasonably relied upon as the basis for legislative

decisions. We offer these requirements as reasonable thresholds that we believe should be transcended when considering allegations of "secondary effects" as a basis for legislation. These thresholds or critical questions that may be asked about a study will permit the Court to distinguish objective and fair assertions of the existence of secondary effects from mere unfounded allegations.

Third, we engage in a critical review of the 1977 "secondary effects" study undertaken at the request of the Los Angeles City Council *in light of these basic requirements* for reasonable reliance on a study's findings.

We attempt to determine: What secondary effects, if any, were found to be associated with "adult" establishments in the City of Los Angeles. Our review of this study finds that in most respects, that study *does not* establish a connection between the existence of an adult business and increases in crime and urban blight and decreases in property values. We find that the study does not even demonstrate the *general* effects of increases in crime or decreases in property values as the result of the concentration of such businesses -- inapposite to the claims of Los Angeles -- much less the *particularized* effects concerning combinations of such businesses at the same location.

We further find that in those few instances where a connection is alleged or implied, the conclusions are predicated upon unscientific and/or flawed methodology so facially apparent that no court should be able to conclude that a legislative body could have reasonably relied upon it as a basis for enacting certain regulations. Because of the lack of true findings in regard to a connection between adult businesses and

negative secondary effects and the significant methodological flaws found in the 1977 Study, we conclude that there is certainly no sufficient justification for the City of Los Angeles to be able to utilize that Report in order to preclude "multiple use" adult businesses.

Fourth, we synopsize and review for this Court a series of more recently conducted "secondary effects" studies of adult businesses that *do* meet the basic requirements for reasonable reliance. These studies have been undertaken at the behest of not only the business establishments involved, but also by at least one local government seeking justification to regulate adult facilities. They measure the impact of long-existing exotic dance facilities in: 1) Fulton County, Georgia (also reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001)); 2) Charlotte/Mecklenburg County, North Carolina; and 3) Fort Wayne, Indiana. Unlike the Los Angeles 1977 Study, these investigations are based on sound scientific methodologies and the results obtained therefrom are imbued with sufficient trustworthiness so that they can be relied upon for legislative decision-making.

Having laid this foundation, we then address the City of Los Angeles' contention that the findings of the 1977 Study can be applied to the distinct question of the effects of combination-type business, such as Alameda Books and Highland Books.

Finally, we address the policy implications for the secondary effects doctrine raised by our analyses contained herein.

ANALYSIS

I. The Ten Most Frequently Cited Secondary Effects Studies, Including the 1977 Los Angeles Study, Show No Objective Evidence of a Relationship Between a Concentration of Adult Businesses and Negative Secondary Effects.

As we established in our Appendix to the First Amendment Lawyers Association *Amicus Brief* submitted to this Court in *City of Erie v. Pap's A.M.*, studies conducted pursuant to sound methodological principles demonstrate no correlation between the presence of certain adult businesses and the existence of surrounding negative secondary effects (such as increases in the incidence of prostitution and violence). *See*, City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1403 n.3 (2000) (Souter, J., dissenting). *See also*, Brief for First Amendment Lawyers Association as *Amicus Curiae*, 16-23, at App. 1-29.

Following submission of our analysis of these oft-utilized secondary effects studies to this Court, we undertook to expand upon that review, which resulted in a paper submitted to the Annual Meeting of the International Communication Association, 2000, which received a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. That analysis was then subjected to further peer-review and ultimately published as a paper entitled Governmental Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances; Debunking the Legal Myth of Negative Secondary Effects, *Paul, et al. Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391.*

In examining the history of the uses of these studies by municipalities, we found a consistent tendency to incorrectly assume that these studies, as a group, showed evidence of problems attributed to adult facilities. Municipalities tended to inappropriately equate the simple fact that a "study" had been undertaken with positive evidence of a relationship between adult businesses and negative secondary effects in a community. Most municipalities never considered the methodological validity of these studies, nor did they even appear to have critically examined the studies in order to determine their true findings. In fact, two of the ten "studies" most frequently cited by government bodies in regard to regulating adult businesses (Detroit, MI and Beaumont, TX) were not empirical data collection efforts at all, or even testimony from citizens, but merely reports discussing recommendations concerning the regulation of adult uses. *Paul, et al.*, at 386.

According to our previous analyses, the 1977 Los Angeles Study is the third most frequently used study by municipalities as a basis for regulating adult businesses. However, as we have noted, the authors of the 1977 Study themselves actually claimed to find *no* causal relationship between adult businesses and decreases in property values. Further, we identified serious methodological problems associated with the Los Angeles Police Department's investigation of the supposed relationship between adult businesses and certain types of criminal activity. Therefore, we concluded that the 1977 L.A. Study did not offer even the most rudimentary form of scientifically reliable evidence of a relationship between adult uses and any form of negative secondary effect. *Paul, et al.*, at 378-379.

Contrary to our assertions, however, Los Angeles not only believed that their Study found a relationship between the concentration of adult businesses within the Hollywood section of the city and negative secondary effects, but it now contends that it is reasonable to extend the findings of that Study to the question of the effects of individual combination-type businesses, such as Alameda Books and Highland Books.

Obviously, it is important to address the City's contention that the findings of the 1977 Study can be applied to this new question. We address this in **Part V** of the paper.

However, before doing so, we lay a foundation in **Part II** where we first develop a set of threshold issues that should be evaluated in order to determine whether a "secondary effects study" can be reasonably relied upon as a justification for the enactment of laws and regulations; in **Part III** where we then describe in greater detail and in light of these principles, why the Los Angeles Study contains no scientifically reliable evidence of a relationship between even the *existence* of adult businesses and negative secondary effects in the first place; and in **Part IV** where we contrast that study with more recently conducted investigations which – given the employment of sound methodology – we believe then contain reliable results.

II. The Basic Requirements for Reasonable Reliance on Evidence Obtained From a Study of the Secondary Effects of Adult Businesses.

In our appendix to the *Pap's* amicus brief and as contained in our recently published paper, we analyzed

the most frequently cited secondary effects studies in light of a list of criteria that we believed are critical in order for such evidence to meet the standards of scientific reliability as defined by this Court in *Daubert v. Merreli Dow*, 509 U.S. 579 (1993). *See, e.g., Paul, et al.*, at 355-391.

Of course, we do not contend here that a municipality cannot rely upon a secondary effects study as a basis for legislation unless and until that report has been found to have met the elastic *Daubert* standard. Rather, we provide criteria for a court to utilize in determining whether a municipality can justifiably rely upon such a study as a basis for enacting regulations of adult entertainment establishments, or in the particular words of this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), whether a court can constitutionally conclude that a particular study is "reasonably believed to be relevant to the concerns that the municipality meant to address." *Id.* at 51-52.

Succinctly put, we contend that before a municipality can justifiably or reasonably rely upon a particular study as a basis for enacting restrictions on First Amendment freedoms, that study must have at least a modicum of scientific validity (and therefore reliability), and be shown to be relevant to the proposed legislative enactments. However, as we note below, the procedures used to insure scientific validity and reliability do not differ substantially from plain English principles that we intuitively apply to our everyday decision-making.

We have reviewed in our published paper a list of factors derived from the *Daubert* standards. We note there that a municipality need not necessarily be held to

each of those criteria when legislating. *Paul, et al,* at 370-371. We do contend, however, that at least two of the *Daubert* factors: 1) design of the study so that an error rate can be calculated; and 2) adherence to professional standards in using techniques or procedures (most of which are designed to aid in the calculation of an error rate), should be found by courts to be procedural prerequisites in order for municipalities to be able to utilize them as a basis for regulating expression. These factors insure "evidentiary reliability."

Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Renton*, 475 U.S. at 51-52.

In a scientific study, the error rate refers to the probability of accepting a result as true, when it is in fact false. It is an indication of the reliability of a finding. *See, Paul,* at 371, for a technical description of how to calculate such a rate. The results of properly conducted surveys, experiments and quasi-experiments are always couched in terms of an error rate. Professional standards that aid in the calculation of an error rate have been devised by scientists in a particular area of inquiry is, consequently, also necessary in order to insure methodological integrity and thus the validity of a study. *See, Paul, et al.,* at 370-372.

Based upon our investigation of the literature and studies both past and recent, we have identified four

methodological criteria that facilitate adherence to professional standards of inquiry that we believe should be considered before a court could conclude that such a report could be reasonably relied upon in order to justify enactment of a certain regulation.

A study of secondary effects should be examined in order to determine whether they answer or violate the following principles:

(1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them answers they wanted to hear?"

These criteria are neither difficult nor cumbersome to apply, nor are they novel in nature. We apply these standards, in an intuitive fashion, when making routine decisions every day. For example, who among us does not ask, when trying to guess the reliability of a new car we are about to purchase: How does the car we are considering compare to a Ford, or a Toyota? If we owned a car from that manufacturer in the past and it broke down, was that a one-time fluke or is this a consistent pattern with this brand? Are we sure we are not trying to convince ourselves that the car is more reliable than it is because the car is fast and is a convertible? Finally, would we listen only to the car sales person about the reliability of the vehicle or would we seek an objective selection of opinions about the car?

A. "Compared to what?"

Crime rates have been shown to be associated with a concentration of various groups of individuals and businesses.[1] Other things being equal, there are apt, for example, to be more crimes in a densely populated urban area than an undeveloped track of land where people, and therefore "targets," are few and far between. Accordingly, the question that should be asked is not whether there is *any* history of crime in the areas surrounding an adult business (since virtually all business establishments where the public congregates, adult and non-adult alike, will demonstrate to some degree this "connection"), but rather whether there is *more* crime in areas surrounding adult facilities than other type of business establishments situated in comparable areas. The same is true for property values and economic blight. An adult business may be placed, for example, in a depressed area pursuant to zoning requirements, but that factor, in-and-of-itself, does not establish that the adult facility somehow *caused or exacerbated* urban blight and the decrease of property values.

Accordingly, in order to insure that accurate and fair comparisons are being considered, a control or

---

[1] P. A. Engstad. Environmental Opportunities and the Ecology of Crime: Crime in Canadian Society (1975); D. C. Duffala. Convenience stores, armed robber, and physical environmental features. American Behavioral Scientist, 20: 227-246. (1976). Dennis W. Roncek and M. A. Pravatiner. Additional evidence that taverns enhance nearby crime. Sociology and Social Research, 70; 185-188; Richard Block and Carolyn Block. Space, place, and crime: Hot-spot areas and hot places of liquor-related crime. In Crime and Place, edited by J.E. Eck and D. Weisburd. Vol. 4 of Crime prevention studies. Monsey, New York: Criminal Justice Press.

comparison area must be selected that is truly "equivalent" to the area(s) containing the adult entertainment business(es). We have previously elaborated on the factors that may ensure equivalence and the calculation of an error rate in the test of differences between the adult and control areas. *Paul*, at 373.

B. "Is this just a one-time fluke?"

A sufficient period of elapsed time, ideally both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic or aberrant pattern of social activity. Generally, the longer the time period under study, the more stable and reliable (and more valid) the estimates of secondary effects.

C. "Is crime measured according to a reliable source?" and "did the city or the police go looking for more crime?"

The crime rate in a secondary effects study must be measured according to the same valid source for all areas considered. Although we describe this concern in detail in *Paul*, at 373-374, it is especially important that the measurement of crime be factually valid and reliable, such as a daily log kept by police of calls for service, or a compilation of the number of actual arrests. In addition, researchers should also acknowledge changes in police surveillance techniques once adult entertainment businesses have been established in a particular community, as well as during the period that a secondary effects study is being undertaken. Obviously,

increased surveillance of an area will have an impact on the amount of crime "detected" by the police.

D. "Did the investigators talk only to people who would give them answers they wanted to hear?"

Survey research, if relevant to the question of adverse secondary effects at all, must be properly conducted. Historically, most such inquiries involve asking real estate professionals, local property owners, law enforcement officers, and/or community residents to *opine* as to the effect that the presence of an adult business would have on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are undertaken. While subjective surveys may provide us with a sense of the general *opinion* of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, they do not provide sound evidence of a relationship between these businesses and the actual impacts on the surrounding areas.

Even if some survey research may be relevant to the issue at hand, it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. We discuss these in *Paul, et al.*, at 374.

III. The 1997 Los Angeles Study Authors Themselves Claim to Have Found No Evidence of a Causal

Relationship Between Adult Businesses and Decreases in Property Values, and at Best Claim Only an Equivocal Relationship with Crime. More Importantly, this Equivocal Relationship is Based Upon a Flawed Comparison and is Predicated Upon a "Special Policy Study" Undertaken in Order to Ferret Out More Crime. In addition, the Study Does Not Contain the Requisite Attributes to Allow It to be Reasonably Relied Upon.

The 1977 LA Study report is a combination of four separate research endeavors, each of which will be discussed in terms of our threshold questions.

A. The City Planning Department investigating the effects of concentrations of adult businesses on area property values reported that they did *not* find any consistent increase or decrease in property values associated with adult businesses.

In this portion of the Study, the researchers, asking the "compared to what" question, compared changes in property values from 1970-1976 for five "study" areas (those containing concentrations of adult businesses) and four "control" or comparison areas (those containing no such concentrations).

The six-year time span between 1970 and 1976 is significant in that the authors claim it represented a period of substantial increases in the number and concentration of sexually oriented adult businesses in the study areas specifically, as well as throughout the city in general.

The study findings showed little differences between the study and comparison areas.

This lack of difference leads the researchers to state: "On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have *directly* influenced the assessed valuations of such properties."[2] It is interesting to note that the authors of the study underlined the word "directly." The authors may have wished their readers to "read between the lines" and conclude that they may have found evidence of an "*indirect*" influence of adult business concentrations on property values. Yet, no such evidence is offered anywhere within the study.

And, while there are procedural problems with this portion of the study many aspects of it actually show *higher* property values in the adult areas than the non-adult control areas (one set showing a 400 percent greater increase). Such findings are directly opposite to the assumption that these studies (and in particular the 1977 LA Study) stand for the proposition that the existence of adult businesses, or at least a concentration thereof, reduce property values and increase urban blight.

Although containing some methodological flaws, this first study represents the strongest (most methodologically sound and therefore most reliable) of the four sections of the report from a scientific perspective. Yet, the results suggest that no such relationship between a concentration of adult uses and secondary effects exists.

B. The second part of the 1977 LA Study claims to have found that *public opinion* is strongly opposed to the operation of adult businesses. Yet, such a

---

[2] 1977 LA study at 2 (emphasis in original).

"study," even if performed correctly, does little more than attempt to gauge subjective opinions. It does not answer the question of whether adult businesses *cause* adverse secondary effects. And, in any event, the public opinion polling undertaken by the City does not meet the professional standards for performing methodologically valid, reliable and trustworthy social scientific survey research.

We will leave it to others – the lawyers – to discuss the question of whether public opinion, even if appropriately and accurately measured, can ever serve as the basis of the suppression and/or regulation of speech and expression related activities. However, even if public opinion were to have some relevance to a secondary effects analysis, our review of this portion of the 1977 LA Study leads us to conclude that any results would be of little to no scientific relevance because of the methodologies used.

Two versions of a survey were administered in this part of the study to determine public opinion concerning adult businesses. The first survey was given to residents and property owners who lived and/or worked within 500 feet of any of the five study areas. This survey yielded a return of only 581 of the 3600 questionnaires, or a 16 percent rate. A separate survey was sent to all of the members of the American Institute of Real Estate Appraisers having a Los Angeles address and also to members of the California Association of Realtors whose offices were located in the vicinity of the study areas (retained from the first section of the report). Only 81 of the 400 questionnaires (or 20 percent of those sent out) were returned.

In both cases, the response rates of these surveys fall well below the acceptable professional standards (a

professional rule of thumb is that a response rate of 50 percent is adequate for analysis and reporting; a response rate of 60 percent is good; and, a response rate of 70-75 percent is very good).[3]

Low response rates such as those in the 1977 Los Angeles Study indicate the presence of a high response bias. In other words, the City may have only heard from people who were motivated to complain about the presence of adult businesses and used the questionnaire to voice their opinion.

Compounding the bias even further, a large portion of the residents and property owners who returned questionnaires were given the questionnaires at two town meetings held to discuss the "problem" of adult businesses.[4]

In the end, such a collection of respondents is surely not a randomly chosen sample from the population of people who reside near adult businesses, with each person having an equal chance of being chosen for the study. Without obtaining a random sample of respondents from the community, the study authors cannot calculate an error rate and, as such, the reliability of any of their findings cannot be determined. And, here, the survey appears to have been conducted in a gerrymandered fashion in order to obtain the desired results.

In summary, the researchers (the City Planning Department) failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques.

---

[3] See Earl Babbie, The Basics of Social Research 240 (1999).
[4] 1977 LA study, at 32 n.4

Finally, even if the opinion poll had been conducted in a scientifically sound manner, the research reported in this section does not answer the question of whether concentrations of adult businesses *cause* adverse secondary effects.

Survey opinions cannot replace the evidence supplied by objective comparisons of (for example) property values and/or crime statistics compiled within areas containing adult entertainment businesses, with those garnered from areas containing no such businesses.

C. The third section of the report discusses the results from a 1974 "cluster" analysis performed by the City of Los Angeles Community Analysis Bureau (CAB). However, the City's own analysis for the Hollywood area belies the idea that crime is higher near adult businesses. For other geographical areas, study and control area sites were so incomparable on several key population and economic characteristics as to invalidate legitimate crime comparisons.

This section of the report attempts to determine if the presence of adult businesses is related to criminal activity by comparing areas with adult businesses to areas that did not contain such businesses. The CAB's "cluster" analysis entailed grouping each of the City of Los Angeles's 750 census tracts (the smallest geographical area for which information of residents is collected on a regular basis) into a smaller set of 30 "clusters," or combinations of tracts.

To accomplish this "clustering," the CAB examined each census tract on 66 census variables that

they had deemed to be the most accurate descriptors of the tracts. Importantly, five of the variables used by the CAB to group the tracts into clusters were crime variables. These included: the number of assaults per 100 population, robberies per 100 population, burglary per 100 improved parcels, total arrests per 100 population and narcotic arrests per 100 population aged 14 – 44.[5]

The clusters were also grouped by real estate value variables such as approximate median value of owner occupied units and approximate median monthly rent of renter occupied units.

The authors then statistically compared these clusters that encompassed the adult and comparison areas (three adult areas and three control areas were compared in the Hollywood region of Los Angeles and two adult areas in the North Hollywood and Studio City region were compared to one control area in the San Fernando Valley).

It should be noted that at this point something extraordinary was found. The study authors admit that all of the tracts that were included in the Hollywood adult business areas *and* in the control condition areas were, statistically speaking, identical to each other. The importance of this finding cannot be overstated. It establishes that when undertaking precisely the statistical test that would most reliably yield knowledge of whether the Hollywood census tracts containing adult businesses have higher rates of crime than comparable tracts that do not contain adult businesses, no such higher rates were found.

---

[5] 1977 LA study, at 44 n.4, 49.

According to this test, then, performed by the City itself, the adult business areas and control areas were more similar to each other, in terms of crime, than they were to any other region of the city. In other words, despite the concentration of adult businesses operating within the study areas in Hollywood, those areas with adult businesses were actually more similar to the control areas than they were to other areas in the city.[6]

These findings are *exactly contrary* to what would be expected if there was a connection between adult businesses in Hollywood and the adverse secondary effects of increased crime and decreased property values.

The other two adult business areas (North Hollywood and Studio City) and the one remaining comparison area fell across eight separate census tracts that each fell into one of six different clusters. The implication here is that these adult and comparison areas were actually poorly matched. Specifically, the study and control areas were significantly disparate on several key population and economic characteristics that could influence both crime rates and real estate values (irrespective of the presence of an adult facility). Any differences found between them regarding crime rates or property values is more than likely the result of one or more factors normally associated with criminal activity, rather than the presence or absence of adult businesses.

Nonetheless, regardless of these substantial problems in matching study and control areas, or perhaps because of them, no reliable pattern of differences on the crime rate variables could be found

---

[6] 1977 LA study, at 45-46 n.4.

between and the areas with concentrations of adult entertainment businesses and those without such concentrations.

For example, the number of assaults per 100 persons in the population was *lower* in the adult business area clusters (.46 and .37) than the control area clusters (.48). The robbery rate for one of the study area cluster groups (.17) was *equal* to that for the control area clusters (.17), while the other study area cluster groups were found to have a higher robbery rate (.267) than the control. Burglaries per 100 improved parcels were found to be *substantially lower* than the control area clusters (13.50) for one of the adult area cluster groups (10.94) and slightly higher for the other (13.86). Total arrests per 100 persons in the population were found for both of the study area clusters to have an insignificantly higher rate (4.2 & 4.2) than the control area (4.1). Narcotics arrests per 100 persons in the population were found to be *lower* for the North Hollywood study area cluster groups than the San Fernando Valley control clusters (1.6), but higher for the Studio City study cluster groups (2.66).

Taken as a whole, then, we may note that out of the ten comparisons made between the adult and control areas on crime statistics reported for the Studio City and North Hollywood regions (utilizing these ill-matched areas for comparison purposes), four found higher crime rates in control (non-adult) area clusters, one found no differences between study and control area clusters, and five demonstrated higher crime rates in the adult area clusters. These findings provide no evidence of an actual relationship between the concentration of adult entertainment businesses and the negative secondary effect of increased crime.

The findings in this section represent the results of the most scientifically sound examination of the relationship between concentrations of adult businesses and criminal activity offered in the entire 1977 LA Study. Only in this section of the report does the City attempt to compare criminal activity in areas containing concentrations of adult businesses (study areas) with properly matched comparison areas containing no such concentrations.

Having found, however, no reliable evidence of differences in crime or property value decreases in areas containing adult businesses, the City then turned to a "special" police study of the Hollywood area.

D. The final section of the Los Angeles Study report focuses on the results of a "special" police department study that was intended to compare the occurrence of certain types of criminal activity in the Hollywood area with the rate of such activity throughout the rest of the city. The first problem with this "study" is that the police admit to stepped-up police surveillance in the Hollywood area between 1969 and 1975, but admit there was no such surveillance increase for the rest of the city.

Unlike the other three sections of the report, the study reported on in this section was not undertaken by the City Planning Department, but by the Los Angeles Police Department (LAPD). The basic finding of this portion or the report provides the opinion and "conclusion" that because crime is higher in the Hollywood area than in other portions of Los Angeles, and because Hollywood had a greater concentration of adult businesses than the remainder of the City, that the increased incident's of crime in Hollywood are directly related to the presence of adult entertainment facilities.

The first and most substantial problem with this study is that LAPD freely admitted that they had stepped-up surveillance efforts in Hollywood in 1975 during the period they were compiling the criminal activity counts that were later compared to earlier 1969 figures. No such increase in surveillance efforts was reported for the Hollywood region in 1969 or for the rest of the city in either 1969 or 1975. Further, the LAPD reported a 31% increase in the combined number of patrol officers and criminal investigators assigned to the Hollywood area compared to an increase of only two thirds that size in the remainder of the city.

It is likely that the greater increase in certain types of criminal activity between 1969 and 1975 was found by the police in the Hollywood region when compared to the rest of the city because there was an increase in the number of officers looking harder for crime in Hollywood.

The incomparable increases in the number of officers and the stepped-up intensity of surveillance efforts in the Hollywood region render any findings from this section of the 1977 Los Angeles study unreliable according to any scientific criteria.

E. The second problem with the "special" police study is that it compares the occurrence of criminal activity in the Hollywood area *generally* with the rate of such activity throughout the remainder of Los Angeles. The authors incorrectly infer that because there may be a difference in crime rates between these two geographic regions, that this proves that adult businesses were the cause of the difference. This inference is a logical error known as the "Ecological Fallacy."

The City's interpretation of the results from the "special" police study falls prey to a common logical error in reasoning about research findings known as the "Ecological Fallacy." The fallacy is to assume that something learned about a unit in general says something about the individuals making up that unit.

For example, consider a finding that voting precincts (the ecological unit) with larger percentages of women (individuals) voted, on average, for the Republican candidate in an election. Although we may be tempted to do so, we cannot conclude that women in the precinct were more likely than men to have voted for the Republican candidate, since we have only information collected at the level of precinct, not at the level of the individual voter. Perhaps, the women's vote was more or less "split" while the men in each precinct voted overwhelming for the Republican candidate.

Similarly, we cannot assume that a higher crime rate in Hollywood is due to adult businesses unless we collect information that links crime to the adult businesses *per se* rather than only measuring crime in Hollywood generally and then comparing it to the rest of LA.

The City of Los Angeles commits the Ecological Fallacy in its 1977 Study when, upon finding a difference between the crime rates in the Hollywood area and the rest of the city, it assumes -- *out of an almost infinite list of variables* -- that this difference is due specifically to the concentration of adult businesses in Hollywood, when the researchers did not measure the actual impact of such businesses in Hollywood at all. Simply comparing the crime rates in the entire Hollywood area

(regardless of whether such crime occurred on or near an adult business property) with the remainder of the city as a whole is an invalid method of attempting to determine whether the increase of crime in the Hollywood area is somehow associated with adult establishments.

F. Summary and implications.

We have illustrated above that not only are there significant methodological flaws in the manner in which the four portions of the 1977 Los Angeles Study were conducted, but that, more importantly, there are no true findings contained in that report which could allow any reasonable social scientist to conclude that adult entertainment facilities were somehow connected to increase in crime and decreases in surrounding property values. More importantly, there are no findings in that Study, direct, indirect, or even implied, justifying the necessity for precluding "multiple use" establishments or providing any support whatsoever for the proposition that such a regulation would serve to reduce or ameliorate such secondary effects.

IV. There Are Studies That Pass the Threshold Questions: (1) "Compared to What?" (2) "Is This Just a One-time Fluke?" (3) "Is Crime Measured According to a Reliable Source?" and "Did the Government Go About Looking for More Crime to Justify its Legislation?" (4) "Did the Investigators Talk Only to People Who Would Give Them the Answers They Wanted to Hear?" These Studies Have Found No Evidence of Adverse Secondary Effects for Adult Businesses and Exotic Dance Establishments.

After having analyzed the prior secondary effects studies, and in particular the 1977 Los Angeles Study,

and having made certain statements concerning the proper methodology that should be utilized in any such investigation in order to be confident that there is even a modicum of trustworthiness in the results obtained, we now undertake an analysis of more recently conducted evaluations of the supposed nexus between adult business establishments and perceived adverse secondary effects. Unlike the LA 1977 Study, the studies described below have attempted to adhere to appropriate methodological concerns so as not to violate the fundamental scientific, methodological and common sense principles discussed above.[7]

These studies, some of which were conducted at the behest of adult business owners but others which were commissioned by the applicable governmental unit, fail to establish any relationship between the operation of adult entertainment businesses (at least those in the form of establishments that present live nude, "topless" or "pasties and g-string" dance entertainment) and negative secondary effects; they offer the highest degree of evidentiary reliability of any preexisting secondary effects studies to date; and they certainly lend evidentiary credence to the underlying proposition of this paper--that being that courts should not accept the mere recitation of a supposed "secondary effects study," without specific analysis thereof, in order to justify regulation and in some instances prohibition of speech and expression related activities.

Overwhelmingly, these studies demonstrate that when proper methodology is employed, and the threshold questions transcended, there are no

---

[7] Pursuant to instructions of the Clerk of this Court, copies of the materials referenced in this section of this paper have been lodged with the Court.

demonstrable adverse secondary effects of adult entertainment establishments in the form of crime, reduction of property values, and urban blight.

A. The Fulton County Studies.

These studies are reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). On June 13, 1997, the Fulton County Police Department completed a study concerning the number of calls for police assistance and the number of types of crimes occurring in the vicinity of twelve drinking establishments; six that featured adult entertainment and six that did not. This study meets the methodological criteria that we discuss in this paper. The study concluded that, for the time period January 1, 1995 through May 31, 1997, there was *no statistical correlation* of an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated *greater* instances and calls for service and reported crime at *non*-adult entertainment establishments that served alcoholic beverages.

The methodological features of this investigation conform closely with several of the scientific principles and common sense rules we apply here to determine if a finding can be trusted. First, crime was measured according to a reliable source--the number of calls for police assistance recorded by computer and compiled by the police objectively, on a daily basis. Second, there was no "stepped up police surveillance" that could inflate crime measurements. A comparison was made between crime rates surrounding the adult establishments and crime surrounding comparable business establishments—answering the "compared to

what" question. And, finally, a sufficient time period, 30 months of calls for service, was utilized to avoid capitalizing on a "one-time fluke" in criminal activity.

In addition, an economic impact study was conducted in 1997. Six Fulton County adult entertainment establishments commissioned Land Development Analysts, Inc. to conduct a study of the clubs' economic impact on their surrounding environs. This study sought to identify negative impacts, if any, on the business volumes, rental rates and property values of surrounding properties. The study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volumes and proposed development in the vicinity of the studied adult clubs. The investigation found no detrimental impacts as caused by the adult facilities.

In response, the County Board of Commissioners had the study peer-reviewed. The Board retained its own appraiser to inspect the subject properties and to review the economic impact study. The appraiser hired by the Board certified that the clubs had gathered the appropriate data and drew appropriate conclusions.

B. Charlotte/Mecklenburg County North Carolina Studies.

Two studies, a property value appreciation study and a crime study, were undertaken in 2001 in the Charlotte/Mecklenburg County, North Carolina, area. As with the Fulton County studies, these investigations utilize the scientific principles and common sense rules outlined above.

The Property Values Study (*See*, "Measuring secondary effects using spatio-temporal estimation of real estate price appreciation," George W. McCarthy and Henry Renski, University of North Carolina at Chapel Hill, 5/24/01) made use of the entire tax appraisal database for Mecklenburg County, which lists all properties and the last two sales prices of the properties (approximately 600,000 properties). The authors only used houses that were sold twice between 1980 and 1999 (approx. 65,000 properties). Methods were used to determine how far the properties were from the 20 adult dance clubs in the county. The authors then compared annual real estate appreciation rates near clubs versus not near clubs in Mecklenburg County.

The findings indicated that examining performance over time, housing near adult establishments appreciated at least as fast or faster in 11 of twenty years.

Using 1980-2000 tax assessment data from Mecklenburg County, North Carolina, the authors estimated annual appreciation rates and evaluated the extent to which appreciation rates are related to the location of adult clubs. The study showed that there was no evidence that negative secondary effects on house price appreciation can be found in two decades of housing transactions in Mecklenburg County. In fact, the authors note that their interpretation may be too conservative:

> "The results of the study are consistent with the empirical results of the oft-cited studies of negative secondary effects discussed above. In almost every study discussed, the secondary effects

associated with adult establishments are inconclusive. However, this is a rather conservative reading of the results. One might make the argument that there is evidence from the other studies, evidence that is validated in this study, that there are *positive* secondary effects associated with proximity to adult establishments. While the existence of positive secondary effects might seem an absurd claim, an argument might be made that the location of adult establishments is non-random.

The non-randomness might be associated with the same non-randomness that leads to the location of other undesirable activities (for example, junkyards, mobile home parks, other noisy or dirty production activities) to areas with inexpensive properties. Low priced properties might provide higher than average returns, especially as urban sprawl or development limits make the areas more desirable development locations" (pg. 20).

The Charlotte Crime Study (*see*, "Are Adult Dance Clubs Associated with Increases in Crime in Surrounding Areas? A Secondary Crime Effects Study in Charlotte, North Carolina," May 18, 2001, Kenneth C. Land, Jay R. Williams, and Michael E. Ezell, Duke University) tested the hypothesis that the presence of an adult nightclub increases the number of crime incidents reported in localized areas.

Appropriate methodology was utilized to select suitable control (non-adult nightclub) sites that were comparable (matched) to the study (adult nightclub) sites on key demographic and other variables that are generally regarded as being related to the incidence of crime.

With support from the United States Department of Justice Office of Community Oriented Policing Services, the Charlotte-Mecklenburg Police Department maintains a computerized reported incidents information system for the city of Charlotte and Mecklenburg County, North Carolina, that permits the easy collection of data concerning all crime incidents reported at or near each of the adult nightclubs and control sites for the three years 1998 through 2000. This information served as the basis of the report.

The authors grouped the reported crime incidents into six categories, ordered from the most to the least inclusive as follows: Total crimes; total Uniform Crime Reports Index Crimes; total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, robbery); total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny-theft, motor vehicle theft, arson); sex crimes; and all other crimes.

The results revealed that with respect to *all six categories* of crime incidents under investigation, the overall mean numbers of crime incidents for all three years combined are *substantially less* in the areas surrounding the adult nightclubs than in the areas surrounding the control (non-adult) sites.

C. The Fort Wayne Study.

An empirical study of criminal activity surrounding exotic dance nightclubs in Fort Wayne, Indiana, was undertaken in 2000 by the authors. [8]

As with the Charlotte/Mecklenburg and the Fulton County studies, this examination of the supposed adverse effects of so- called "adult" establishments also adheres to the requirements set out by this Court in *Daubert* for the proper conduct of a social scientific inquiry.

A 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in the city and matched to the club areas on the basis of demographic features known to be related to crime and also matched on the basis of commercial property composition.

Information on calls to the police for service (many of which ended in arrest) for the three-year period of 1997-2000, was obtained. Only crimes presumed to be related to exotic dance establishments were included in our examination. These included: 1) Sex crimes (rape, molestation, indecent exposure, sexual battery); 2) aggression related non-sexual

---

[8] The Ft. Wayne clubs studied do not operate in a form of what is traditionally considered to be an "adult" entertainment business. The entertainers at these establishments perform wearing "pasties" and "g-strings" consistent with Indiana statute and this Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). For this reason, while we refer to previous reports and studies as attempting to analyze the relationship of "adverse secondary effects" and "adult" businesses, we generally refer to the studied facilities here either as "nightclubs" or "exotic dance" establishments.

offenses (shootings, fights, non-sexual battery, disturbances); and 3) thefts, burglaries and robberies.

The number of calls to the police and arrests in the areas surrounding the exotic dance nightclubs was then compared to the number of crimes found in the matched comparison areas. The analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas. For sex crimes (presumed to be especially likely to be related to exotic dance entertainment establishments) such as rape, molestation, indecent exposure and sexual battery, the overall number of crimes was nearly identical in the areas surrounding the exotic dance nightclubs and the comparison areas. The same pattern of similar crime levels in the club and comparison areas held for thefts, burglaries and robberies. However, for aggression-related, nonsexual offenses, the club areas actually had *only one half* as many calls for service as the comparison areas.

We concluded that there was no empirical evidence of the existence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Fort Wayne. Any assumption that such effects existed and that this city should regulate such establishments on the basis of such "adverse secondary effects" was therefore, we contended, not substantiated by that study.

In summary, the findings from the Fulton County, Charlotte/Mecklenburg and Fort Wayne investigations, unlike most of the previously cited secondary effects studies (including the Los Angeles 1977 Study) are

empirically reliable because they apply scientific and common sense principles. Our analyses of these studies suggest that when proper methodology is employed, there are few if any adverse secondary effects found as being associated with adult establishments. In fact, these studies suggest, as did the governmentally prepared St. Paul, Minnesota (1978) study (discussed in detail in *Paul, et al.*, at 375, as being the only methodologically sound investigation among the ten most frequently cited studies), that there is more crime and neighborhood deterioration in other areas of the community, especially where alcohol is served in a non-adult entertainment setting -- than in the areas immediately surrounding adult nightclubs.

Now, in light of these observations, we address the immediate question before the Court.

V. Even if the Los Angles 1977 Study Had Found Evidence of Adverse Secondary Effects Generally, Such findings Would Not Provide Any Information as to Whether "Combination" Uses Engender Particularized Problems That Would be Specifically Addressed by a General "Dispersal" Zoning Ordinance. The Question of When Study Findings can be Generalized to Another Time, a Different Place, or Other People is ultimately an Empirical One.

The fundamental question under consideration by this Court is: Assuming that the 1977 LA Study *had* established evidence of the existence of secondary effects associated with the concentration of adult businesses, can that information be utilized to justify a law prohibiting the establishment of "adult" "combined" or "mixed" uses?

We conclude, as the Ninth Circuit did, that such an extension is unwarranted and that these limited "findings" provide no basis or justification –whether empirical, intuitive or otherwise –for the zoning provisions under review. In scientific terms, the Circuit Court was grappling with the question of when it is appropriate to "generalize" the findings of an empirical investigation to circumstances other than those originally studied.

A. When is it unreasonable to generalize study findings from one situation to another?

In science, "generalizability" is defined as the quality of a research finding which justifies the inference that it represents something more than the specific observations upon which it is based.

As the present case illustrates, generalizing a research finding beyond the specific observations on which it is based can include multiple considerations. Sometimes it is a matter of seeking similarities between the "character' of the original units studied and the new units to which we wish to generalize. Other times, it may be a matter of frequency of presentation of, for example, adult material as in equating the single showing of a film with the harmful effects assumed to occur with businesses devoted to adult fare. *See, e.g., Tollis v. San Bernardino County,* 827 F.2d 1329 (9th Cir. 1987).

More broadly, sometimes generalizability it is a matter of similarity of concepts: If you discover why people commit burglaries, can you generalize that discovery to other crimes as well?[9] Often, it involves the

[9] Earl Babbie, supra, at 215 n.8.

generalization of findings from a sample to a population. We cannot generalize our findings to other populations because we did not take a random sample from the population (we sampled males and we wish to generalize to females, or we sampled older people and we wish to generalize to younger people in the population).

Other times, we cannot generalize because of the methods we employ to study a phenomenon. If we have measured a phenomenon at a certain level, or chosen a certain "unit of analysis," our findings may not apply well to other units we may wish to consider. Here, our example of the Ecological Fallacy from the "special police study" of the 1977 Los Angeles Study above applies. It is logically impossible to conclude anything about the impact of the concentration of adult businesses in Hollywood when measurements of crime have been taken only at the level of the entire community.

B. Whether the results of a study can be generalized to other times, locations, situations or other persons is an empirical question.

As can be seen from these examples, there is no "magic formula" for determining when a study is generalizable. Instead, social scientists, when confronted with important social policy questions, have come to rely on additional empirical investigations when in doubt about a study's general applicability. An additional investigation is often the only way to insure against improperly extrapolating findings. Thus, whether or not one is able to generalize across people, places, or methodologies may ultimately be an empirical question. Sometimes, only an additional study can tell us how far

a specific set of observations, made earlier, may be extended.

C. Los Angeles should have first empirically determined if it's original zoning legislation was effective before implementing another, more restrictive, set of regulations.

The evidence Los Angeles has relied upon here -- the 1977 Study -- contained no empirical evidence that addresses the specific question of whether an individual combination bookstore/arcade produces any of the increased crime the original study (allegedly) found resulting from a concentration of adult businesses. Nor was any analysis undertaken of the effect upon supposed adverse secondary effects by the enactment of the original "dispersal" zoning provisions which were themselves predicated upon the findings of the 1977 Los Angeles Study itself.

If we assume that the dispersal requirement was meant to ameliorate supposed secondary effects associated with adult businesses, we must also then logically assume that following the enactment of those provisions (which clearly pre-dated the "multiple use" regulations at issue here), whatever secondary effects may have existed would have been significantly reduced or abrogated altogether.

The question then remains, and it is clearly an empirical one, of what secondary effects, if any, exist *after* the enactment of a specific regulation meant to address those problems. If we do not ask that question, we invite the never-ending enactment of yet more and more (and ever more onerous) restrictions without ever examining whether there are any problems left to be

addressed following the enactment of a law meant to correct such problems.

Here, mere reference to the 1977 Los Angeles Study tells us nothing objectively about what secondary effects may remain once the dispersal regulations were enacted in an effort to address those problems. In addition, in the absence of *any* empirical evidence – old, new or otherwise – of the adverse effects associated with these combination adult uses, it is unreasonable, we contend, for any court to permit a governmental unit to infer or conclude that absent additional regulations, a bookstore/arcade combination would have harmful secondary effects.

Here, Ninth Circuit was faced with the question of whether the government may restrict to selected locations, mixed uses adult businesses on the sole basis of the results of the 1977 Los Angeles Study. In our opinion, that court was correct in asserting that it was not reasonable to rely on that study as justification for these restrictions, first, because that study does not objectively demonstrate any clear adverse effects and, second, even if such effects were reliably shown, it is not readily apparent that they may be generalized to the new question about mixed use businesses *after* the enactment of a general dispersal ordinance.

VI. The Policy Implications for the Secondary Effects Doctrine.

As we have shown above, legislative bodies and courts are now confronted with methodologically sound studies that fail to demonstrate a connection between the existence of adult businesses and negative secondary effects. They are also faced with the

submission of the older-type studies, many "conducted" between twenty to thirty years ago which in some circumstances were not "studies" at all, in other circumstances demonstrated either no connection between adult uses and secondary effects or even an *inverse* connection, in many cases dealt with types of businesses that no longer even exist (adult movie theaters), in virtually all circumstances were undertaken *before* the enactment of specific regulations meant to alleviate those perceived problems, and which by-and-large were not undertaken utilizing even the most rudimentary methodological constraints in an effort to insure validity of the results.

Given the state of contradicting empirical evidence that will be faced by legislative bodies and courts in the future, guidelines may be welcomed to establish under what circumstances the assertion of secondary effects may be utilized as a justification for regulations upon speech and expression related activities. We assert that two sets of inquiries (A and B below) should be made when examining purported evidence that is submitted in an effort to justify or challenge the enactment of such a regulation.

A. Any particular study of secondary effects should be examined in order to determine whether it answers the following questions or violate the following principles: (1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go about looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them the answers they wanted to hear?"

While a local legislative body may not be held to these standards, certainly a court may find it useful to ask these questions in order to determine whether purported supporting evidence for a legislative enactment could be reasonably relied upon. In evaluating the vitality, and indeed validity, or purported "evidence," courts may best be served by turning to the standards we have laid out. Such an analysis would allow courts to separate "the wheat from the chaff," and the truth from the "junk science."

B. If there is a question as to whether a study is being applied more broadly than originally intended, or is being utilized to justify successive laws following enactment of regulations meant to address perceived problems noted in the study itself, a new empirical investigation is often warranted.

It should be axiomatic that the fundamental obligation of a court should be to seek the truth. Here, and in future cases, the question must be asked as to whether, at a certain point of time and in a certain set of circumstances (particularly, in light of already-existing regulations), there exists such evidence that can be *reasonably* relied upon establishing that certain types of adult uses engender some forms of secondary effects so as to warrant the enactment of additional laws?

Justice Souter stated in *Pap's* that cities interested in regulating adult activities on the basis of secondary effects should be required to provide germane evidence of a relationship between the expressive activity and secondary effects. 120 S. Ct. 1382 at 1403-04 (Souter, J., concurring in part and dissenting in part). This case and -- in light of the evidence that we have discussed -- cases that will be adjudicated in the

future where the courts will be required pursuant to *Pap's* to evaluate both the "old" and these "new" studies in the secondary effects calculus in order to determine the validity of a particular regulation, well illustrate why this burden should be demanded.

As we have stated, whether findings from a study conducted for one purpose can be applied to another situation is often an empirical question. Common problems occur with generalization to circumstances, people, situations, and time periods other than those originally studied. Unless the question of whether particular findings are empirically relevant to new situations is addressed through scientifically valid empirical research, the secondary effects doctrine will be viewed as a theory not grounded upon an inquiry of truth, but merely as a theoretical (and unsubstantiated) basis to regulate and in some circumstances ban what some may consider to be undesirable expression.

To not undertake additional empirical inquiry is to make it permissible for governments to continue to regulate today on the basis of a study conducted 25 years ago, and undertaken prior to the enactment of other regulations meant to address the perceived problems of secondary effects. In addition, given the nature of some of these previous studies, reliance upon them makes it permissible to regulate on the basis of the opinions of, for example, a group of vocal real estate board members, sampled improperly, whose opinions cannot be extrapolated or generalized to an entire community. Without additional or new empirical investigations, properly conducted, there is nothing to prevent government from using *any* supposed finding from *any* "study" to justify *any* regulation, no matter how

broadly or unreasonably the findings may be extrapolated.

Collection of empirical information is now not overly difficult or expensive. The Fulton County police collected their evidence easily. Such evidence is now at most municipalities' fingertips in the form of calls for service to the police that are routinely computerized and logged. Property value data is in most circumstances easily obtained from real estate databases designed to track these sales for tax purposes. Certainly, there should be nothing feared in regard to investigation as to the true effects that certain adult businesses may have upon specific municipalities, particularly in light of previous (and now long-standing) regulations -- such as zoning dispersal requirements and anti-nudity provisions -- that were enacted with the specific intent to ameliorate such secondary effects.

In *Pap's*, Justice O'Connor and the plurality provided room for challenges, based on the collection of empirical evidence, to assertions made by municipalities regarding a relationship between adverse secondary effects and adult establishments. The plurality noted that the adult business in question in *Pap's* could have challenged the City of Erie's assertion that nudity led to ill effects but did not do so. This leaves room for the introduction of additional secondary effects evidence both in city council hearings and as a basis for court litigation. When courts are faced with these conflicting assertions of secondary effects, they should utilize the tools that we have suggested herein in order to be able to determine truth and reject fiction and innuendo.

Dr. Daniel Linz, Ph.D.
Bryant Paul, MS

NEIGHBORHOOD DETERIORATION
and the
LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS
in
ST. PAUL

Prepared by the

COMMUNITY CRIME PREVENTION PROJECT
of the
Minnesota Crime Control Planning Board
and the
Division of Planning
DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
of the
City of St. Paul

April, 1978

In May of 1977, the Community Crime Prevention project of the Minnesota Crime Control Planning Board released a study which indicated a strong clustering of crimes around on-sale liquor establishments in Minneapolis. Subsequent to the issuing of this report, the city of St. Paul, through the city council and the mayor's office, became concerned about the impact which adult entertainment had on the neighborhoods in which they were located. These mutual interests and experiences of the city of St. Paul and the Community Crime Prevention project combined to produce this report.

NEIGHBORHOOD DETERIORATION and the LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS

INTRODUCTION

Bars, X-rated theaters, bookstores, specializing in pornography, massage parlors and other adult entertainment businesses are generally thought to deteriorate the neighborhoods in which they are sited. These establishments are believed, for instance, to attract unsavory outsiders, set bad examples for minors or otherwise lessen the desirability of the affected neighborhoods as places to live.

Despite this widespread concern about the impact of various adult entertainment facilities, little research has been conducted on the effect of these establishments on the neighborhoods in which they are located. A study of the effects of sexually oriented businesses in California found that areas with high concentrations of these establishments generally showed a relative decrease in property values when compared to areas without such establishments.

However, the study determined that these concentrations of sex-oriented businesses *were not the primary cause* of the lowered property values.[1] A study in Minneapolis of the spatial distribution of crimes around facilities with on-sale liquor licenses showed a distinct pattern of clustering of crimes within one-tenth of a mile of these establishments.[2] However, no studies have been conducted of the overall effect which all adult entertainment establishments (both alcohol-serving and sexually oriented) have on their surrounding neighborhoods. The following study was designed to investigate the effects of a variety of adult entertainment facilities in St. Paul upon the character of the neighborhoods in which they are located.

* * *

ADULT ENTERTAINMENT ESTABLISHMENTS, 1970-1976

A list of all adult entertainment establishments existing in St. Paul during the study period of 1970-1976 was complied by the St. Paul Planning Division. Establishments were classified as either alcohol-serving businesses or as sexual businesses, which included adult bookstores, adult theaters, and saunas. Alcohol-serving establishments were further classified as to whether they had a tavern (live entertainment) license and, if so, whether such entertainment was sexual in nature. This information was verified, with the aid of the city licensing division's records and the city policy

---

[1] *Study of Effects on the Concentration of Adult Entertainment Establishments in the City of Los Angeles*, (Los Angeles: City Planning Department) June 1977.

[2] *Crime in Minneapolis: Proposals for Prevention*, (St. Paul, Minn.: Governor's Commission on Crime Prevention and Control, May, 1977).

department, for the initial and final study time-points, 1970 and 1976.[1]

This classification system results in the following adult entertainment establishment types:

I. Alcohol-serving establishments.
   - A. Alcohol-serving, without live entertainment
   - B. Alcohol-serving, with live entertainment
     1. Nonsexual entertainment
     2. Sexually oriented entertainment

II. Sexually oriented establishments
   - A. Sexual only (adult bookstores, theaters, and saunas)
   - B. Alcohol-serving, with sexually oriented entertainment (same establishments as in B-2 above)

* * *

The number of all adult entertainment establishments (all alcohol-serving and sexually oriented establishments combined) present in neighborhoods in 1970 is significantly related to the neighborhood quality.[1]

---

[1] Although the possession of a license for live entertainment was verified for each establishment, it could not be ascertained from the records whether all of these establishments classified as having sexually oriented live entertainment were those known by the city police department to offer exclusively sex-oriented entertainment. Establishments which had lingerie or swim wear luncheon shows, etc., for only brief periods of the study time were not classified as sexually oriented.

[1] Throughout this study, the presence or absence of a relationship is determined by statistical significance. That is, the statement "a relationship was found . . ." indicates that the analysis results were significant at the $p \leq .05$ level; the statement "no relationship was

That is, neighborhoods with higher crime rates and lower median housing values in 1970 tend to have more adult entertainment facilities located in them. Specifically, neighborhood quality in 1970 is related to the number of alcohol-serving establishments. When types of alcohol establishments are studied, neighborhood quality shows a relationship to the presence of establishments without live entertainment licenses, but has only a (statistically) marginal relationship to establishments with live entertainment licenses. No relationship is found between neighborhood deterioration and the number of sexually oriented establishments present in 1970.

A similar pattern of association appears in the 1976 analyses. The number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) in 1976 is significantly related to neighborhood quality. As in 1970, this relationship is seen for the number of alcohol-serving establishments. This relationship between neighborhood quality and liquor-serving establishments in 1976 is present for both entertainment – and nonentertainment – licensed facilities (although the relationship is stronger for the establishments without entertainment licenses). Again, as in 1970, no relationship is found between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 1, the present of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. *However, when types of adult entertainment establishments are studied separately, this relationship is*

---

found . . ." indicates that the analysis results were *not* significant at the $p \leq .05$ level.

found only for the alcohol-serving establishments, not for sexually oriented facilities.

* * *

These analyses show the same overall pattern of results as found in Stage I. For both 1970 and 1976, the presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) is related to neighborhood deterioration. As in Stage I, when adult entertainment establishment types are analyzed separately, the relationship is found only for alcohol-serving establishments. Neighborhood quality/deterioration is significantly related to the total presence of alcohol-serving establishments, and to the presence of establishments without live entertainment licenses. The relationship found between deterioration and entertainment-licensed establishments in Stage I does not persist after zoning and neighborhood age are controlled. As in Stage I, there is no relationship, in either 1970 or 1976, between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 2, a relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls. This relationship is found for the alcohol-serving adult entertainment facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. *Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment establishments is more accurately viewed as a relationship between neighborhood deterioration and the presence of all alcohol-serving establishments.*

* * *

TABLE 3
SUMMARY OF STAGE II:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

In conclusion, as shown in Table 3, adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present. This cycle of "deterioration-adult entertainment-deterioration" is seen only for areas in which there are alcohol-serving establishments.* Sexually oriented establishments, when analyzed by themselves, do not

show this cyclic pattern of relationship with neighborhood deterioration.

* * *

TABLE 3
SUMMARY OF STAGE III:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related

Although adult entertainment establishments tend to locate in already deteriorated neighborhoods, there is a stronger tendency for deterioration to follow the location of adult entertainment establishments.

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

E. SUMMARY OF FINDINGS

A summary of the relationships found in Stages I through IV is presented in Table 5.

[Insert Table 5]

STAGE I: *Does deterioration tend to occur in the same areas of the city as adult entertainment businesses are located, in 1970? in 1976?*

The presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. However, when types of adult entertainment establishments are studied separately, this relationship is found only for the alcohol-serving establishments, not for sexually oriented facilities.

STAGE II: *Does the relationship between neighborhood deterioration and adult entertainment persist even when other factors are controlled, in 1970? in 1976?*

A relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls for legal and market influences. This relationship is found for the alcohol-serving adult facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment facilities is more accurately viewed as a relationship between

neighborhood deterioration and the presence of all alcohol-serving establishments.

STAGE III: *Has deterioration in neighborhoods followed rather than preceded the location of adult entertainment businesses in the affected neighborhoods, during the 1970-1976 time period? That is, do adult entertainment establishments contribute to neighborhood deterioration?*

Adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present.* This cycle of "deterioration-*adult entertainment*-deterioration" is seen only for areas in which there are alcohol-serving establishments. Sexually oriented establishments do not show this cyclic pattern of relationship with neighborhood deterioration.

STAGE IV: *Is the effect of adult entertainment on neighborhood quality/deterioration a threshold phenomenon? That is, does neighborhood quality show a marked deterioration after a critical number of adult entertainment establishments are located in an area?*

The number of adult entertainment establishments in a neighborhood has a strong threshold effect on associated neighborhood deterioration, for both 1970 and 1976. This means that the increase in deterioration associated with each additional establishment is not constant. The effect of each

additional adult entertainment establishment on neighborhood quality depends upon the number of such establishments already present in the area. The addition of an adult entertainment establishment to an area with more than one or two of these establishments already present is associated with a marked increase in neighborhood deterioration. When types of adult entertainment establishments are studied separately, threshold effects are found for the number of alcohol-serving establishments, not for the number of sexually oriented establishments present.

SUMMARY AND IMPLICATIONS FOR PUBLIC POLICY

These is statistically significant relationship between the number of adult entertainment establishments (alcohol-serving and sexually oriented combined) located in an area and the deterioration of that area as reflected in housing values and crime rates. This relationship was found to exist in both 1970 and 1976, even when legal and market influences such as light industrial/commercial zoning and neighborhood age are controlled for.

When types of adult entertainment establishments were studied separately, a significant relationship was found between neighborhood deterioration and the number of alcohol-serving establishments; in the presence of controls for legal and market influences, the number of alcohol-serving establishments without entertainment licenses was found to be most strongly related to neighborhood deterioration.

It should be noted, while the presence of sexually oriented establishments taken by themselves does not

show a significant association with neighborhood deterioration, these establishments tend to locate in areas which already reflect the effects of other adult entertainment establishments, making it difficult without further analysis to ascertain the unique contribution which sexually oriented establishments have on neighborhood deterioration.

From: David Bugher
To: DHEID
Subject: Adult businesses

Well, I have a depressing statistic. It's good in one way and bad another. Since incorporation, the City has amassed 15,415 reported criminal incidences. Get this, 25% occurred along a 300 acre strip of Pacific Highway and South Tacoma Way. How many incidences were within 1,000 feet of all adult entertainment establishments? 400! A lousy 400! That's only 2.6% of the total! Jack Burns will love this.

What bothers me is that many communities use the secondary effects of adult businesses (i.e. crime) to justify stricter codes. This aspect or element just doesn't seem to be present. Sure, there is a great amount of crime in the area, but it is associated with I-5 and the low income neighborhoods along I-5.

I have tried working this issue from a number of different angles. I have tried to focus on the types of criminal incidences (rape, burglary, vandalism) to see if such a corollary existed. It doesn't. I know this isn't what people want to hear, however, that is what is reported.

Dave

REGULATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN ST. CROIX COUNTY

ST. CROIX COUNTY
PLANNING DEPARTMENT

SEPTEMBER, 1993

App. 114

2. Crime There is much evidence to support the assertion that concentrations of adult businesses often result in an increase in crimes, particularly prostitution, drugs, assault, and sex crimes. A planning department study in Phoenix, for example, compared three study areas containing adult entertainment businesses with three control areas that had comparable demographics and land use, but without adult entertainment businesses. The three study areas had, on average, 43% more property crimes, 4% more violent crimes, and over 500% more sex crimes than the control area (McClendon, p. 3).

A high rate of crime near concentrations of adult entertainment establishments has also been reported in Detroit, Los Angeles, and Beaumont, Texas (McClendon, pp. 2-3). Crime statistics for 1978 and 1979 in Fayetteville, North Carolina reveal this impact. In 1978, Fayetteville's overall crime rate decreased 11% while crime in the district encompassing Hay Street (which had a large concentration of adult entertainment businesses) increased 7.5%. During 1979, the overall crime rate continued to decrease, while increasing in the Hay Street district (Yow, p. 34).

Another aspect of crime is the growing concern that organized crime is controlling the adult entertainment business. Local governments are concerned about this involvement and the potential for corruption that accompanies it (Yow, p. 34).

3. Community Reputation. A proliferation of adult entertainment establishments may lead to a negative perception of a neighborhood, or of the entire community. In a neighborhood, this negative reputation can lead to declining property values and physical deterioration. The

effects can also be felt city-wide. Fayetteville for example, has expressed concern about the City's reputation and its effect on industrial location decisions (Yow, P. 34).

4. Quality of Life. Although "quality of life" is a nebulous term, courts have upheld zoning restrictions based on this concern. In 1976, for example, the United States Supreme Court upheld in Young vs. American Mini-Theatres (427 US 50) a Detroit zoning ordinance that restricted the location preserve the character of specific areas of the city, is perhaps the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of "quality of life" McClendon, p. 1).

III. Adult Entertainment Establishments in Unincorporated St. Croix County.

In general, unincorporated St. Croix County has not experienced any major problems with adult entertainment establishments. Currently, there are two adult cabaret establishments operating in the unincorporated part of the County that could be affected by new County policies on adult entertainment. These businesses are located in the Towns of St. Joseph and Somerset.

With the projected expansion of the interstate highway system between St. Croix County and the greater Twin Cities metropolitan area, there is a growing concern about the expansion of the adult entertainment industry in the County. While it is recognized that adult entertainment businesses cannot be prohibited entirely, the County would like to have some control over their location and operation. There is also concern that such establishments might be located near

schools, churches, parks or residential areas.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GM Enterprises, Inc.,

Plaintiff,

AFFIDAVIT OF ANNE SCHMIEGE

vs.

Town of St. Joseph, Wisconsin,

Defendant.

Court File No.

STATE OF WISCONSIN)
)SS
COUNTY OF ST. CROIX)

Anne Schmiege, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant has just completed her second year of law school at Hamline University School of Law, St. Paul, Minnesota.

App. 118

2. Your affiant is employed as a law clerk at Doar, Drill & Scow, S.C., one of the law firms representing Plaintiff in the above-entitled matter.

3. At the instruction of Matthew Biegert, one of Plaintiff's attorney, your affiant researched the issue of property values, in the area surrounding Plaintiff's establishment.

4. In order to do this, your affiant examined the records on assessed evaluation maintained by the St. Croix in the regular course of business. The assessed evaluation of the adjacent properties was as follows:

   a. The property bordering the Cajun Club on the north (Tax ID No. 030-2028-90-300), increased in estimated fair market

value from $65,600 in 1993 to $142,500 in 2001. This reflects a 117 percent total increase, or an average annual increase of 13 percent.

b. The parcel bordering the Cajun Club on the NW, (Tax ID No. 0300-2028-90-200), increased in fair market value from $21,100 in 1993 to $355,100 in 2001, an increase in value of 1583 percent, or an average annual increase of 175.89 percent.

c. The parcel bordering the Cajun Club on the West (Tax ID No. 030-2028-90-100), increased an estimated fair market value from $17,800 in 1993 to $43,300 in 2001, or an average annual increase

of 143 percent, with a yearly average increase of 12.41 percent.

d. The parcel bordering the Cajun Club on the South (Tax ID No. 030-2047-70-00), increased in fair market value from $137,900 in 1992 to $254,500 in 1993, a total increase of 85 percent, with an average annual increase of 8.5 percent.

e. The property immediately across the street (Tax ID No. 030-2030-10-000), increased an estimated fair market value from $496,900 in 1992 to $1,470, 700 in 2001, a total increase of 111 percent, for an annual average increase of 11.1 percent.

5. Your affiant also obtained from the Bureau of

App. 121

Equalization at the State Department of Revenue in Eau Claire, Wisconsin, the increase in rates of residential property values for St. Joseph Township as a whole. Those statistics revealed that between 1992 and 2001, residential property values throughout the Township of St. Joseph increased from 105,667,700 in 1992, to $278,459,600 in 2001. Or an average annual increase of 10.29 percent.

6. As a result, it is clear that 4 of the 5 properties adjacent to the Cajun Club increased in value of the past 9 or 10 years at a rate higher than the average rate of increase for the value of residential property in the Township of St. Joseph as a whole.

7. Your affiant was also assigned to determine

App. 122

whether there is any statistical relationship between the presence of adult entertainment facilities and the prevalence of sexually transmitted diseases.

8. Your affiant did so by seeking out sexually transmitted disease statistics for St. Croix County (a county which currently has two adult uses, the Cajun Club and Loch Ness, but which, for most of the past decade has had either 3 or 4 such uses, with Ben's and Hilltop no longer encouraged adult entertainment business); Polk County, which has no adult uses, Pierce County, which has had a single adult use, and Dunn County, which has had a single adult use.

9. Your affiant obtained the statistics for calendar years 1995-1999 from the official website of the

Wisconsin Department of Health. The statistics for calendar years 2000 and 2001 were obtained by e-mail from the county health offices.

10. The rate of sexually transmitted diseases, as a percentage of the county's population for St. Croix County is attached hereto as Exhibit A.

11. The same statistics for Polk County are attached hereto as Exhibit B.

12. The statistics for Pierce County are attached hereto as Exhibit C

13. The statistics for Dunn County are attached hereto as Exhibit D.

14. As an examination of those statistics will clearly reveal, there appears to be no relationship whatsoever between the presence of adult businesses and the rates of sexually

transmitted diseases.

15. Of the 4 counties studied, St. Croix County, with the highest number of adults-only businesses, consistently has had the lowest rate of sexually transmitted disease as a percentage of the population.

16. Polk County, with no adults-only businesses, has consistently displayed a higher rate of sexually transmitted diseases than does St. Croix County.

17. Pierce County, with only one adult use, had a lower rate of sexually transmitted diseases than did Polk County with no adult uses.

18. Dunn County, with a single adult use, had a higher rate of sexually transmitted diseases than did Polk County with no adult uses. However,

it also had a higher rate of sexually transmitted diseases than did St. Croix County, which had anywhere from 2 from 4 such uses during the period of time examined.

19. Consequently, it is absolutely clear that there appears to be no relationship whatsoever between the presence of sexually explicit entertainment and the prevalence of sexually transmitted diseases within the counties of western Wisconsin.

20. Your affiant executes this affidavit in support of the attached motion for preliminary

injunction.

_____

Anne Schmiege

Subscribed and sworn to before
me this____day of June, 2002

_____

Notary Public

App. 127

St. Croix County ~A

2001		
Population:	66,319	
		Percent of population:
Chlamydia Trachomatis:	49	.074%
Genital Herpes:	12	.018
Gonorrhea:	2	
2000		
Population:	63,155	
Chlamydia Trachomatis:	34	.054%
Genital Herpes:	21	.033
Gonorrhea:	1	
1999		
Population:	*59,520*	
Chlamydia Trachomatis:	59	.099%
Genital Herpes:	14	.023
Gonorrhea:	*<5*	
1998		
Population:	*57,770*	
Cmamydia Trachomatis:	45	.078%
Genital Herpes:	14	.024
Gonorrhea:	<5	
1997		
Population:	*56,530*	
Chlamydia Trachomatis:	26	.046%
Genital Herpes:	9	.016
Gonorrhea:	*<5*	

1996

Population:	55,140	
Chlamydia Trachomatis:	*25*	.045%
Genital Herpes:	7	.013
Gonorrhea:	0	

1995

Population:	54,060	
Chlamydia Trachomatis:	23	.043%
Genital Herpes:	12	.022
Gonorrhea:	<5	
AIDS:	Cases	Deaths
AsofJulyl998	13	10

Polk County

EXHIB1T B

2001

Population:	42,285	
Chlamydia Trachomatis:	42	.099%
Genital Herpes:	18	.043
Gonorrhea:	2	

2000 (unofficial local stats)

Population:	41,319	
Chlamydia Trachomatis:	35	*.085%*
Genital Herpes:	9	.022
Gonorrhea:	1	

1999

Population:	37,700	
Chlamydia Trachomatis:	28	.074%
Genital Herpes:	7	.019
Gonorrhea:	<5	

1998

Population:	37,230	
:Chlamydia Trachomatis:	25	.067%
Genital Herpes:	5	.013
Gonorrhea:	<5	

1997

Population:	36,890	
Chlamydia Trachomatis:	32	**.087%**
Genital Herpes:	11	.030
Gonorrhea:	<5	

1996

Population:	36,910	
Chlamydia Trachomatis:	14	.038%
Genital Herpes:	6	.016
Gonorrhea:	<5	

1995

Population:	36,520	
Chlamydia Trachomatis:	29	.079%
Genital Herpes:	9	.025
Gonorrhea:	0	

AIDS:	**Cases**	**Deaths**
As of July 1998:	13	11

Pierce County **EXHIBIT C**

2001 (unofficial Local stats)

Population:	37,290	
Chlamydia Trachomatis:	32	.086%
Genital Herpes:	1	.003
Gonorrhea:	8	

2000 (unofficial local stats)

Population:	36,804	
Chlamydia Trachomatis:	19	.052%
Genital Herpes:	4	.011
Gonorrhea:	8	

1999

Population:	35,240	
Chlamydia Trachomatis:	21	.060%
Genital Herpes:	<5	
Gonorrhea:	•	

1998

Population:	34,730	
Cklamydia Trachomatis:	24	.069%
GenitalHerpes:	6	.017
Gonorrhea:	<5	

1997

Population:	34,410	
Chlamydia Trachomatis:	14	.041%
Genital Herpes:	8	.023
Gonorrhea:	<5	

1996

Population:	34,220	
Chlamydia Trachomatis:	22	.064%
Genital Herpes:	<5	
Gonorrhea:	<5	

1995

Population:	34,050	
Chlamydia Trachomatis:	23	.068%
Genital Herpes:	<5	
Gonorrhea:	<5	

AIDS:	Cases	Deaths
As of July 1998:	10	7

Dunn County

EXHIBIT D
2001 (preliminary stats)

Population:	40,352	
Chlamydia Trachomatis:	60	.149%
Genital Herpes:	3	.007
Gonorrhea:	5	

2000

Population:	39,858	
Chlamydia Trachomatis:	83	.208%
Genital Herpes:	7	.018
Gonorrhea:	1	

1999

Population:	38,710	
Chlamydia Trachomats:	64	.165%
Genital Herpes:	8	.021
Gonorrhea:	<5	

1998

Population:	38,500	
Chlamydia Trachomatis:	68	.177%
Genital Herpes:	10	.026
Gonorrhea:	<5	

1997

Population:	38,190	
Chlamydia Trachomatis:	71	.182%
Genital Herpes:	15	.039
Gonorrhea:	<5	

1996

Population:	37,840	
Chlamydia Trachomatis:	40	.106%
Genital Herpes:	13	.034
Gonorrhea:	5	

1995

Population:	37,630	
Chlamydia Trachomatis:	48	.128%
Genital Herpes:	10	.027
Gonorrhea:	<5	
AIDS:	Cases	Deaths
AsofJulyl998	7	5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GM Enterprises, Inc.,

Plaintiff,

vs.

AFFIDAVIT OF SUNNIE D. LAMARRE

Town of St. Joseph, Wisconsin,

Defendant.

Court File No.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Sunnie D. LaMarre, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is employed as a paralegal by Randall Tigue Law Offices, P.A., one of the attorney's for Plaintiff in the above-entitled matter.

2. Your affiant was assigned the task of assembling statistical evidence to determine whether or not there was a correlation between the presence of adult entertainment at a liquor-serving establishment, and the frequency of criminal activity at such establishments.

3. In order to do so, your affiant contacted the St. Croix County Sheriff's office and sought information as to the number and nature of police calls to 3 bars in St. Croix County: The Cajun Club, which features adult entertainment, and Dick's Bar and Dibbo's Bar in Hudson, which do not feature such entertainment.

4. Your affiant obtained statistics from the St. Croix County Emergency Communication Center, maintained by said government agency in the normal course of business.

5. Attached hereto as Exhibit A are the number and nature of police calls to the Cajun Club for calendar years 1999-2002.

6. Attached hereto as Exhibit B are the number of police emergency calls to Dick's Bar in Hudson during the same period of time.

7. Attached hereto as Exhibit C are the number of police calls during the same period of time to Dibbo's Bar.

8. Your affiant executes this Affidavit in support of the attached motion for preliminary injunction.

_____

Sunnie D. LaMarre

Subscribed and sworn to before me
this____day of June, 2002

_____

Notary Public

CO EMERG COMMUNICATIONS CENTER

Calls Report by Complaint

EXHIBIT A

First Date: 01/05/2002

Last Date: 05/04/2002

Complaint		*Number*
A	ACCIDENT	2
CS	CONTROLLED SUBSTANCE	1
DTP	DAMAGE TO PROPERTY	1
DIS	DISTURBANCE	1
HAR	HARASSMENT	1
MIS	MISCELLANEOUS	2
MP	MISSING PERSON/RUNAWAY	1
DTP	SUSPICIOUS ACTIVITY COMPLAINT	2
T	THEFT COMPLAINT	1
TC	THREAT COMPLAINT	1
TRF	TRAFFIC COMPLAINT	1
Traffic Stop	Traffic Stop	6
	Report Total:	20

-club

13 police related
7 Traffic related

CAJEN CLUB

BEST AVAILA

CO EMERG COMMUNICATIONS CENTER
Calls Report by Complaint

First Date: 02/02/2001

Last Date: 12/30/2001

Complaint		Number
A	ACCIDENT	9
API	ACCIDENT WITH PI	3
ALA	ALARM	3
ASS	ASSAULT	3
DTP	DAMAGE TO PROPERTY	2
DV	DISABLED VEHICLE	1
DC	DISORDERLY CONDUCT	2
DIS	DISTURBANCE	3
DOM	DOMESTIC	2
FOL	FOLLOW UP	2
FRA	FRAUD COMPLAINT	2
LOST	LOST AND FOUND	2
MIS	MISCELLANEOUS	1
MUT	MUTUAL AID	1
PUB	PUBLIC ASSIST	1
SEX	SEXUAL ASSAULT	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	5
T	THEFT COMPLAINT	2
TRF	TRAFFIC COMPLAINT	3
Traffic Stop	Traffic Stop	11
WEL	WELFARE CHECK	1

clubs

Report Total: 60

45 police Related
15 traffic related

App. 138

LE COPY

ICO EMERG COMMUNICATIONS CENTER

Calls Report by Complaint

First Date: 01/15/2000

Last Date: 12/06/2000

Complaint		*Number*
DIS		2
A	ACCIDENT	7
API	ACCIDENT WITH PI	2
ASS	ASSAULT	2
CKD	CAR KILLED DEER	1
DC	DISORDERLY CONDUCT	3
DIS	DISTURBANCE	10
EMS	EMS CALL	2
FOL	FOLLOW UP	1
MUT	MUTUAL AID	5
SUS	SUSPICIOUS ACTIVITY COMPLAINT	5
T	THEFT COMPLAINT	2
TRF	TRAFFIC COMPLAINT	3
Traffic Stop	Traffic Stop	2
	Report Total:	47

-lwb

42 POLICE RELATED
5 traffic Related

App. 139

CO EMERG COMMUNICATIONS CENTER
f Calls Report by Complaint

First Date: 10/22/1999
Last Date: 12/27/1999

Complaint		Number
FS		
API	ACCIDENT WITH PI	1
DIS	DISTURBANCE	1
PC	PROPERTY COMPLAINT	2
T	THEFT COMPLAINT	1
TRF	TRAFFIC COMPLAINT	1
WAN	WANTED PERSON	1
		1
	Report Total:	8

ubs.

7 police related
1 Traffic related.

CO EMERG COMMUNICATIONS CENTER

Calls Report by Complaint

EXHIBIT B

First Date: 01/01/2002

Last Date: 05/12/2002

Complaint		*Number*
A	ACCIDENT	1
ASS	ASSAULT	1
DTP	DAMAGE TO PROPERTY	1
DC	DISORDERLY CONDUCT	8
DIS	DISTURBANCE	16
DOM	DOMESTIC	1
EMS	EMS CALL	2
FRA	FRAUD COMPLAINT	1
HAR	HARASSMENT	1
PUB	PUBLIC ASSIST	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	1
TEL	TELEPHONE CALLS COMPLAINT	3
T	THEFT COMPLAINT	2
TRF	TRAFFIC COMPLAINT	1
WEL	WELFARE CHECK	1

Report Total: 41

police related = 39
Traffic " = 2

Dicks Bar

111 Walnut st

CO EMERG COMMUNICATIONS CENTER
Calls Report by Complaint

First Date: 01/01/2001

Last Date: 12/28/2001

Complaint		*Number*
SUS		1
A	ACCIDENT	5
ASS	ASSAULT	5
DTP	DAMAGE TO PROPERTY	2
DC	DISORDERLY CONDUCT	19
DIS	DISTURBANCE	32
DOM	DOMESTIC	2
EMS	EMS CALL	7
FRA	FRAUD COMPLAINT	2
HAR	HARASSMENT	1
MP	MISSING PERSON/RUNAWAY	1
PC	PROPERTY COMPLAINT	1
PUB	PUBLIC ASSIST	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	2
T	THEFT COMPLAINT	10
TRF	TRAFFIC COMPLAINT	3
Traffic Stop	Traffic Stop	2
WAN	WANTED PERSON	1
WEL	WELFARE CHECK	5

Report Total: **102**

police related = 91
Traffic " = 11

EMERG COMMUNICATIONS CENTER
lls Report by Complaint

First Date: 01/08/2000

Last Date: 12/22/2000

Complaint		*Number*
A	ACCIDENT	1
ASS	ASSAULT	2
DTP	DAMAGE TO PROPERTY	3
DV	DISABLED VEHICLE	1
DC	DISORDERLY CONDUCT	13
DIS	DISTURBANCE	18
DOM	DOMESTIC	2
EMS	EMS CALL	6
FOL	FOLLOW UP	2
JUV	JUVENILE COMPLAINT	1
MIS	MISCELLANEOUS	1
PC	PROPERTY COMPLAINT	1
PUB	PUBLIC ASSIST	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	5
T	THEFT COMPLAINT	4
TRF	TRAFFIC COMPLAINT	3
WAN	WANTED PERSON	5

Report Total: 69

police related — 61
Traffic " — 8

App. 143

TO EMERG COMMUNICATIONS CENTER
Calls Report by Complaint

First Date: 10/24/1999

Last Date: 12/26/1999

Complaint		*Number*
A	ACCIDENT	2
ANI	ANIMAL COMPLAINT	1
DC	DISORDERLY CONDUCT	3
DIS	DISTURBANCE	2
FOL	FOLLOW UP	1
FRA	FRAUD COMPLAINT	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	1
T	THEFT COMPLAINT	1
Traffic Stop	Traffic Stop	1
WAN	WANTED PERSON	1

Report Total: **14**

Police related - 12
traffic " - 2

EMERG COMMUNICATIONS CENTER

lls Report by Complaint

EXHIBIT C

First Date: 01/13/2002

Last Date: 05/10/2002

Complaint		*Number*
A	ACCIDENT	1
ANI	ANIMAL COMPLAINT	1
DC	DISORDERLY CONDUCT	3
DIS	DISTURBANCE	1
FOL	FOLLOW UP	1
PUB	PUBLIC ASSIST	1
T	THEFT COMPLAINT	2
TRF	TRAFFIC COMPLAINT	1
Traffic Stop	Traffic Stop	1
WAN	WANTED PERSON	1
WEL	WELFARE CHECK	2

Report Total: 15

police related - 10
traffic " - 5

Dibbos

517 2nd St

D EMERG COMMUNICATIONS CENTER

alls Report by Complaint

First Date: 01/01/2001

Last Date: 12/31/2001

Complaint		*Number*
A	ACCIDENT	2
ANI	ANIMAL COMPLAINT	2
ASS	ASSAULT	1
DC	DISORDERLY CONDUCT	3
DIS	DISTURBANCE	3
DOM	DOMESTIC	1
FRA	FRAUD COMPLAINT	1
HAR	HARASSMENT	1
I	INFORMATION	1
PC	PROPERTY COMPLAINT	2
SUS	SUSPICIOUS ACTIVITY COMPLAINT	2
T	THEFT COMPLAINT	5
TRF	TRAFFIC COMPLAINT	2
WAN	WANTED PERSON	2
WEL	WELFARE CHECK	1
	Report Total:	29

Police related - 24

Traffic " - 5

TO EMERG COMMUNICATIONS CENTER
Calls Report by Complaint

First Date: 01/12/2000

Last Date: 12/17/2000

Complaint		*Number*
ASS	ASSAULT	4
CIV	CIVIL MATTER	2
DTP	DAMAGE TO PROPERTY	3
DC	DISORDERLY CONDUCT	4
DIS	DISTURBANCE	4
ED	EMERGENCY DETENTION	1
FOL	FOLLOW UP	1
I	INFORMATION	1
JUV	JUVENILE COMPLAINT	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	2
T	THEFT COMPLAINT	2
TRF	TRAFFIC COMPLAINT	3
Traffic Stop	Traffic Stop	2
WAN	WANTED PERSON	6
	Report Total:	36

police related - 25
traffic " - 11

O EMERG COMMUNICATIONS CENTER
Calls Report by Complaint

First Date: 10/25/1999

Last Date: 12/31/1999

Complaint		*Number*
ASS	ASSAULT	1
ATL	ATTEMPT TO LOCATE	1
DIS	DISTURBANCE	2
EMS	EMS CALL	1
I	INFORMATION	1
PC	PROPERTY COMPLAINT	1
SUS	SUSPICIOUS ACTIVITY COMPLAINT	1
T	THEFT COMPLAINT	1
WAN	WANTED PERSON	3

Report Total: 12

's

police - 12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

GM Enterprises, Inc.,

Plaintiff,

vs.

AFFIDAVIT OF FRED MEYERS
Town of St. Joseph,
Wisconsin,

Defendant.

Court File

No. 02-C-0396-S

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Fred Meyers, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the President of GM Enterprises, Inc., the Plaintiff in the above-entitled matter.

2. Your affiant has reviewed the affidavit of St. Croix Sheriff Dennis Hillstead, submitted in

support of Defendant's motion for summary judgment in the above-entitled matter.

3. In that report, Sheriff Hillstead compares police reports among the Cajun Club, your affiant's establishment, and three other liquor establishments in St. Croix County, to-wit: the Rustic Hut, Willow River Inn, and Garfield's.

4. The comparison between your affiant's establishment and these other liquor establishments, is simply not meaningful, to determine whether the adult entertainment at your affiant's establishment causes adverse secondary effects, for at least the following reasons:

   a. The three other liquor establishments in question are significantly dissimilar to your affiant's establishment in

numerous ways that have nothing to do with adult entertainment. For example, Garfield's is a supper club. It is primarily an eating establishment, which incidentally serves liquor. It does not feature live entertainment of any kind. By contrast, your affiant's establishment in primarily a liquor establishment, which only incidentally serves a small amount of food, and features live entertainment of both a sexually explicit variety and a non-sexual variety.

b. The Rustic Hut and Willow River Inn are small food and restaurant establishments featuring entertainment, if at all, only on weekends. More

significantly, they are located on a isolated rural county road, apart from main thoroughfares. By contrast, the Cajun Club is located on a major thorough fare immediately across the Minnesota border. Bars in Minnesota close at 1:00 a.m., and significant traffic flows from Minnesota to establishments immediately on the other side of the border, between 1:00 a.m. and 2:30 a.m, when Wisconsin bars close.

c. In indicating adverse secondary effects attributable to adult entertainment, the obviously more appropriate comparison is the one submitted by Plaintiffs in support of their motion for preliminary injunction. The comparable bars in

question were Dick's and Dibbo's bars in Hudson, Wisconsin. Like your affiant's establishment, they are primarily liquor establishments, featuring live entertainment, and on main thoroughfare across the border from Minnesota. Comparison of your affiant's establishment with these establishments is a much more meaningful measure of whether police calls in question are attributable to adult entertainment.

d. Finally, it should be noted that your affiant's establishment is not a full-time adult entertainment facility. The Cajun Club is open for business between the hours of 8:00 p.m. and 2:30 a.m. Live

semi-nude dance entertainment is featured only between the hours of 8:00 p.m. and 12:30 a.m. Between the hours of 12:30 a.m. and 2:30 a.m., the Cajun Club is, in essence, a singles bar, playing recorded music for public dancing by customers. Absolutely no effort is made in Sheriff Hillstead's affidavit to distinguish between police calls made to the Cajun Club during the time it operates as an adult entertainment establishment, and the time during which it operates as a singles' bar.

5. Sheriff Hillstead also conveniently neglects to mention in his affidavit his own public statement from May 7, 2000. In an article

appearing in the St. Paul Pioneer Press on that date, a copy of which is attached hereto as Exhibit A, the following statement is reported:

> "The Loch Ness (another semi-nude dancing establishment) is a smaller, low-key operation, and law enforcement authorities say they have had few problems there.
>
> St. Croix County Sheriff Dennis Hillstead, however, said there are more calls to the Cajun Club involving disorderly conduct, medical emergencies, and vehicle accidents. But he is not willing to conclude that the cause is nude dancing (emphasis supplied).

6. As noted in the accompanying affidavit of Matthew Biegert, there is a reason for that lack of willingness: far more such calls occur during the hours in which Cajun Club is not an adult entertainment facility than occur during the hours in which it is.

App. 155

7. Your affiant executes this affidavit in opposition to Defendant's motion for summary judgment.

_____
Fred Meyers

Subscribed and sworn to before me
this____day of December, 2002.

_____
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

G.M. ENTERPRISES, INC.,

Plaintiff,

vs.

AFFIDAVIT

TOWN OF ST. JOSEPH,

Defendant.

STATE OF WISCONSIN
ST. CROIX COUNTY

Matthew A. Biegert, being duly sworn, deposes and states as follows:

1. I am an attorney for the plaintiff in the above-entitled matter.

2. I have resided and/or practiced law in St. Croix County, Wisconsin for over 12 years.

App. 157

3. Dennis Hullestad's affidavit identifies three licensed establishments in the Town of St. Joseph other than the Cajun Club: the Rustic Hut, the Willow River Inn and Garfield's.

4. To my knowledge, the Rustic Hut and Garfield's hold themselves out as restaurants. See ex. A (attached). All three are located further away from the Minnesota border (Minnesota has an earlier bar closing time) and are not located on state highways.

5. Hillestand also produced activity reports relating to the licensed establishments, including the Cajun Club. I have reviewed those reports.

6. The activity reports show the following breakdown of calls to the Cajun Club:

8pm-9pm	6
9pm-lOpm	15
lOpm-llpm	24
1 lpm-midnight	20
midnight-lam	25
lam-2am	60
2am-3am	88
3am-6am	12
9am-8pm	*35*

7. This affidavit is made in opposition to defendant's motion for summary judgment.

Dated: December *5*, 2002

Matthew Biegert